An Overview and Analysis of H.R. 3010, the Regulatory Accountability Act of 2011

Updated March 23, 2012

Congressional Research Service
https://crsreports.congress.gov
R42104

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

In the fall of 2011, a group of Members from the House and the Senate introduced the Regulatory Accountability Act of 2011 (RAA, H.R. 3010 and S. 1606). The RAA would make the most significant legislative changes to the rulemaking process since the enactment of the Administrative Procedure Act in 1946. The RAA would modify and enact into law numerous new general procedures for rulemaking that appear in narrower form in existing law, executive orders, and Office of Management and Budget (OMB) documents. The House of Representatives passed H.R. 3010 on December 2, 2011. The Obama Administration has issued a Statement of Administration Policy against H.R. 3010. Some of the most significant changes the bill would make are listed here. H.R. 3010 would:

- Require agencies to adopt the "least costly" rule that meets "relevant statutory objectives" unless the benefits justify additional costs.
- Provide for judicial review of certain requirements and determinations, for which judicial review is not presently available or for which there is a question as to whether judicial review is available.
- Overhaul the current notice-and-comment (informal) rulemaking process by codifying and modifying existing requirements and instituting many procedural and substantive additions to informal rulemaking.
- Raise questions regarding how the RAA would interact with existing statutory requirements for cost-benefit analysis and statutory prohibitions on cost considerations.
- Impose new requirements on independent regulatory agencies, including cost-benefit analysis and regulatory review by OMB's Office of Information and Regulatory Affairs (OIRA).
- Impact existing case law on judicial deference to agency interpretations of rules and agency guidance.
- Provide that interim rules shall cease to have the effect of law if such rules are not finalized or rescinded in accordance with the RAA's requirements within 270 days of publication of the interim rule or 18 months if the rule is a major or high-impact rule.
- Create a new category of rules, "high-impact" rules, and mandate trial-like formal rulemaking procedures for such rules.
- Require advance notices of proposed rulemaking for certain rules.
- Mandate the identification of costs and benefits, and assure that such benefits justify the cost, in major guidance documents and guidance that involves a novel legal or policy issue arising out of statutory mandates.
- Establish minimum time periods for comment in rulemakings.
- Grant the OIRA Administrator, in statute, increased powers and responsibilities.
- Enable Information Quality Act (IQA) petitions to determine if an agency's proposed rule does not comply with the IQA.

Contents

Appendixes

Contacts

On September 22, 2011, a group of Members from the House and the Senate introduced the Regulatory Accountability Act of 2011 (RAA, H.R. 3010 and S. 1606). The House passed H.R. 3010 on December 2, 2011, by a vote of 253-167. If enacted, the RAA would make broad changes to the federal rulemaking process. Federal agencies currently issue regulations in accordance with requirements in the Administrative Procedure Act (APA), as well as other statutes and executive orders that apply to rulemaking. The RAA would make the most significant legislative changes to the APA since its enactment in 1946. The RAA would modify and enact into law numerous new general procedures for rulemaking that appear in narrower form in existing law, executive orders, and Office of Management and Budget (OMB) documents.

On one hand, the RAA has been praised by industry and trade associations as legislation that would "update the 65 year old regulatory process" by making "the regulatory process more transparent, agencies more accountable, and regulations more cost effective."[1] On the other hand, the RAA has been criticized by government watchdog and environmental groups, such as OMB Watch, as legislation that would result in a "radical overhaul" of the rulemaking process, compromising "public health, worker safety, and environmental quality goals."[2]

The White House has issued a Statement of Administration Policy (SAP) on H.R. 3010, which announced that the President's "senior advisors would recommend that he veto the bill."[3] The SAP states that "the [RAA] would impose unprecedented procedural requirements on agencies that would prevent them from performing their statutory responsibilities."[4] The SAP also asserts that the RAA's new procedures are "unnecessary" and would "invite frivolous litigation."[5]

A comparison of the RAA to requirements in existing law, executive orders, and OMB documents indicates that although the RAA has many characteristics in common with existing statutes and executive orders, it would add many requirements to the rulemaking process. For example, the RAA would allow for judicial review of considerations for which it is not presently available. The RAA would impose new requirements on independent regulatory agencies, such as consultation with the Office of Information and Regulatory Affairs (OIRA) and cost-benefit analysis. The RAA would extend many rulemaking requirements in Executive Order 12866 that currently only apply to "significant" rules, such as OIRA review and cost-benefit analysis, to *all* rules. The RAA would require agencies to provide specific information on statutory and legal considerations, costs and benefits, and alternatives to rules. The RAA would change the procedures for the issuance of agency guidance and require agencies to identify costs and benefits for major or "novel legal or policy issue" guidance. Additionally, the RAA would require the publication of advance notices of proposed rulemaking for "major" rules, "high-impact" rules, and rules involving "novel legal or policy issue[s] arising out of statutory mandates" and add a mandatory 90-day waiting period before publication of a notice of proposed rulemaking for such rules. The bill would set minimum time periods for notice and comment of 120 days for major and high-impact rules, and 60 days for other rules.

---

[1] Letter from Academy of General Dentistry (and other industry and trade association organizations) to The Honorable Lamar Smith, Chairman, Committee on the Judiciary, and The Honorable John Conyers, Ranking Member, Committee on the Judiciary (Nov. 2, 2011), http://www.metalworkingadvocate.org/pdf/HR3010_Letter.pdf.

[2] OMB Watch, Analysis of the Regulatory Accountability Act: An Unjustified, Dangerous Overhaul of Federal Rulemaking Law (Sept. 30, 2011), http://www.ombwatch.org/node/11870.

[3] Executive Office of the President, Statement of Administration Policy: H.R. 3010 - Regulatory Accountability Act of 2011 (Nov. 29, 2011). The full text of the SAP is available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr3010r_20111129.pdf.

[4] *Id.*

[5] *Id.*

Potential effects the RAA may have on the rulemaking process include an increased level of influence for OIRA and, by extension, the President; the potential for rulemaking to take longer than it currently does, particularly for major, high-impact, and novel legal or policy issue rules; a re-establishment of the standards for the selection of regulatory options that is based on minimizing costs rather than maximizing net benefits; the potential need for additional agency resources; a potential increase in agency use of adjudication; and the potential for increased and/or lengthier litigation. These issues are discussed below in the "Potential Issues for Congress" section of the report.

The House and Senate versions of the RAA contain some minor structural differences, as well as major substantive differences in the judicial review provisions with regard to major and high-impact rules and judicial review of an agency's consideration of costs or benefits.[6] Additionally, the House version of the RAA adds requirements for rules involving "novel legal or policy issue[s] arising out of statutory mandates," and the Senate version does not contain additional requirements for such rules. Under the version of the RAA that passed the House, there would be a more explicit requirement that agencies consider "an estimate of the net gain or loss in domestic jobs."[7] The version of the bill discussed in this report is the version that was passed by the House on December 2, 2011.

This report begins by providing a brief overview of the major requirements of the rulemaking process currently found in statutes, executive orders, and OMB documents, many of which would be changed or enacted into law by the proposed RAA. The report then discusses the RAA's proposed changes to these existing rulemaking requirements, providing a side-by-side comparison of the requirements of the RAA to these existing provisions.[8] The "Potential Issues for Congress" section provides some general conclusions and analysis, and it discusses some of the potential implications of the proposed bill. **Appendix A** lists each provision of the RAA in order, alongside any current related requirements. Finally, **Appendix B** lists the acronyms used in the report.

Federal Rulemaking

The most significant piece of rulemaking legislation from the past century was the Administrative Procedure Act of 1946. The APA established standards for the issuance of rules using formal rulemaking and informal rulemaking procedures.[9] Informal rulemaking, also known as "notice and comment" rulemaking or "Section 553" rulemaking, is the most common type of rulemaking.

For informal rulemaking under the APA, agencies are required to publish a notice of proposed rulemaking (NPRM) in the *Federal Register*, take comments on the NPRM, publish a final rule in the *Federal Register*, and provide for a 30-day waiting period before the rule can become effective.[10] The APA specifically authorizes federal agencies to dispense with its requirements for

[6] *See* H.R. 3010, §6 and S. 1606, §6.

[7] This provision in parentheses was added as an amendment when the RAA was under consideration on the House floor.

[8] The report does not address whether judicial review is available for each statutory requirement. For example, the Regulatory Flexibility Act and Unfunded Mandates Reform Act provide for limited judicial review. 5 U.S.C. §611; 2 U.S.C. §1571.

[9] When agencies engage in formal rulemaking, the agency must hold a trial-like hearing. Presently, formal rulemaking is a rarely used process, and its requirements are only triggered when Congress explicitly requires that the rulemaking proceed "on the record." 5 U.S.C. §553(c); United States v. Florida East Coast Railway, 10 U.S. 224 (1973).

[10] 5 U.S.C. §553.

notice and comment if the agency for good cause finds that the use of traditional procedures would be "impracticable, unnecessary, or contrary to the public interest."[11] The APA also provides a good cause exception for the 30-day waiting period between the publication of a final rule and its effective date.[12]

While the notice-and-comment procedures in the APA provide the general structure of the rulemaking process, a number of other requirements have been added to the process in the decades since the APA. The Paperwork Reduction Act[13] (PRA) established a process under which agencies have to consider the paperwork burden associated with regulatory and other actions. The Regulatory Flexibility Act[14] (RFA) requires regulatory impact analyses for rules that will have a "significant economic impact on a substantial number of small entities" and establishes other requirements.[15] Title II of the Unfunded Mandates Reform Act[16] (UMRA) added requirements for agencies to analyze and reduce costs associated with federal mandates upon state, local, and tribal governments and the private sector. The Congressional Review Act[17] (CRA) established a mechanism through which Congress could overturn federal regulations and required that agencies submit their rules to both houses of Congress and the Government Accountability Office (GAO) before the rules can take effect. The Information Quality Act[18] (IQA) required OMB to create guidance for agencies "for ensuring and maximizing the quality, objectivity, utility, and integrity of information" disseminated by agencies and required agencies to establish their own guidelines on information quality.

In addition to the current statutory requirements for the rulemaking process, Presidents also have issued executive orders and OMB has produced documents providing requirements and guidelines for agencies to follow when issuing rules. Executive Order 12866, issued by President Clinton in 1993, calls for OIRA to review "significant" regulatory actions at both the proposed and final rule stage.[19] Furthermore, agencies are required to assess potential costs and benefits for "significant" rules, and, for those deemed as "economically significant" regulatory actions, agencies are required to perform a cost-benefit analysis and assess the costs and benefits of "reasonably feasible alternatives" to the planned rule.[20] Under E.O. 12866, agencies generally must "propose or adopt a regulation only upon a reasoned determination that the benefits" of the

[11] 5 U.S.C. §553(b)(B).

[12] 5 U.S.C. §553(d)(3).

[13] 44 U.S.C. §§3501-3520. For more information about requirements under the Paperwork Reduction Act, see CRS Report R40636, *Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates*, by Curtis W. Copeland and Vanessa K. Burrows.

[14] 5 U.S.C. §§601-612. For more information about requirements under the Regulatory Flexibility Act, see CRS Report RL34355, *The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms*, by Maeve P. Carey.

[15] 5 U.S.C. §§602-04.

[16] 2 U.S.C. §§1532-1538. For more information about UMRA, see CRS Report R40957, *Unfunded Mandates Reform Act: History, Impact, and Issues*, by Robert Jay Dilger and Richard S. Beth, or CRS Report RS20058, *Unfunded Mandates Reform Act Summarized*, by Keith Bea and Richard S. Beth.

[17] 5 U.S.C. §§801-808.

[18] P.L. 106-554, §515; 31 U.S.C. §3516 note.

[19] Executive Order 12866, "Regulatory Planning and Review," 58 Fed. Reg. 51735 (Oct. 4, 1993). Executive Order 12866 revoked Executive Orders 12291 and 12498, which had been issued by President Reagan. Those executive orders were similar but expanded OIRA review to all rules, not just significant rules, and had more stringent requirements for the cost-benefit analyses. For more information, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Maeve P. Carey, at 26-28.

[20] Executive Order 12866, "Regulatory Planning and Review," 58 Fed. Reg. 51735 (Oct. 4, 1993)(§6(a)).

rule "justify its costs."[21] To provide guidance to agencies on what to include and consider in their cost-benefit analyses of rules, OMB issued OMB Circular A-4, a document that describes "best practices" of agencies' economic analyses.[22] OMB, under President George W. Bush, also provided guidelines for agencies to follow when issuing guidance documents.[23]

The combination of statutory requirements, executive orders, and OMB directives comprises the bulk of the current, generally applicable requirements agencies must follow when issuing regulations. The RAA would change or enact into law a number of the requirements mentioned here. Additionally, particular agency statutes may add requirements specific to that agency, and there is a substantial body of case law interpreting existing rulemaking requirements that would be affected by the RAA. The remainder of this report will examine the main provisions of the bill and compare the changes the bill proposes with the current, generally applicable requirements and case law, where appropriate.

This report examines each section of the bill in the order that they are included in the bill. When possible, numbers and letters are included in each section of the report to help clarify what part of the bill coincides with each section of the report.

The Regulatory Accountability Act and Independent Regulatory Agencies

As a preliminary matter, the RAA uses the APA's definition of an agency, meaning that the RAA would impose additional requirements on independent regulatory agencies, which have been exempted from certain statutory and executive order mandates.[24] For example, the parts of E.O. 12866 that concern centralized review of regulations by OIRA do not apply to statutorily designated "independent regulatory agencies."[25] However, other parts of E.O. 12866 *do* apply to

[21] *Id.* (§1(b)(6)). Executive Order 12866, like its predecessor executive orders, does not apply the cost-benefit analysis or OIRA review to independent regulatory agencies. The E.O. defines "significant" regulatory actions as those rules that may "(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." *Id.* (§3(f)). Rules that fall into the first of these four categories are "economically significant" rules. *Id.* (§3(f)(1)).

[22] The most recent version of OMB Circular A-4 was issued in September 2003 and can be found on the White House's website at http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.

[23] Memorandum from Rob Portman, to the Heads of Executive Departments and Agencies, on Issuance of OMB's Final Bulletin for Agency Good Guidance Practices (Jan. 18, 2007), http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf.

[24] *See* 5 U.S.C. §551(1)(exempting Congress, the courts, and other entities from the APA's definition of "agency").

[25] E.O. 12866, "Regulatory Planning and Review," 58 Fed. Reg. 51735, 51737 (Oct. 4, 1993) (§3(b)). The independent regulatory agencies listed in statute are: "the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission." 44 U.S.C. §3502. The United States International Trade Commission is one of the "other similar agenc[ies] designated by statute as a Federal independent regulatory agency" referenced in 44

independent regulatory agencies—such as the requirements that each agency (1) "prepare an agenda of all regulations under development or review" and (2) "prepare a Regulatory Plan … of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter."[26] E.O. 12866's lack of a requirement for the review of regulations promulgated by independent regulatory agencies provides an element of independence from presidential control for these specified agencies, although some of these agencies may choose to submit their rules to OIRA anyway.[27] Rules promulgated by independent agencies, such as the Social Security Administration, are included in OIRA's review processes under E.O. 12866.[28]

Certain statutes applicable to the rulemaking process also exempt independent regulatory agencies from particular requirements. For example, UMRA requires agencies *other* than independent regulatory agencies[29] to write regulatory impact statements when a rule "may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year."[30] While the RAA would not extend the application of UMRA to independent regulatory agencies, similar requirements in the RAA, if enacted, would apply to independent regulatory agencies.

Definitions (Section 2 of the RAA)

The RAA contains a number of definitions, some of which do not currently exist in statute. These definitions are significant since they may trigger various requirements in the rulemaking process, as it would be amended by the RAA's proposals, if enacted.

"Major" Rule

The APA presently does not distinguish between "major" and other rules in the rulemaking process. Under the APA, all rules are promulgated according to the same procedures, regardless of their potential impacts. If enacted, the RAA would impose additional procedures on "major"

U.S.C. §3502(5), although it is not specifically listed there. *See* 19 U.S.C. §1330(f) (stating that the United States International Trade Commission "shall be considered to be an independent regulatory agency for purposes of chapter 35 of title 44, United States Code").

[26] 58 Fed. Reg. at 51738 (§4(b), the Unified Regulatory Agenda; §4(c), the Regulatory Plan).

[27] Memorandum from Sally Katzen, Administrator, OIRA, to Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, on Guidance for Implementing E.O. 12866 (Oct. 12, 1993) (stating "while the President's 'Statement of Regulatory Philosophy and Principles' (Sec. 1) applies by its terms only to those agencies that are not independent, the independent regulatory agencies are requested on a voluntary basis to adhere to the provisions that may be pertinent to their activities"). Commenters at an April 2011 Resources for the Future conference stated that both President Reagan and President Clinton obtained legal opinions from the Office of Legal Counsel at the Department of Justice stating that Executive Orders 12291 and 12866 could cover independent regulatory agencies. However, the decision not to cover them was reportedly a political, not a legal, determination. See Sally Katzen, Conference Summary: Can Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Commissions? 2-3 (Apr. 2011), http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_KatzenRemarks.pdf.

[28] As used in this report, the term "independent regulatory agencies" refers to the boards and commissions identified as such in the Paperwork Reduction Act (44 U.S.C. §3502). The term "independent agencies" refers to other agencies that answer directly to the President, but are not part of Cabinet departments (e.g., the Environmental Protection Agency, the Social Security Administration, and the General Services Administration).

[29] The definition of agency in UMRA has "the same meaning as defined in section 551(1) of title 5 [the APA], but does not include independent regulatory agencies." 2 U.S.C. §658(1).

[30] 2 U.S.C. §1532(a).

rules (such as advance notices of proposed rulemaking, lengthier comment periods, retrospective review requirements, time periods for the completion of interim rulemaking proceedings, and automatic grants of petitions for certain hearings) that differ from the procedures for other rules. For example, an agency issuing a "major" rule would need to issue an advance notice of proposed rulemaking (ANPRM) 90 days before issuing an NPRM. The RAA defines a "major rule" as:

> any rule that the Administrator of the Office of Information and Regulatory Affairs [OIRA] determines is likely to impose—
>
> (A) an annual cost on the economy of $100,000,000 or more, adjusted annually for inflation; (B) a major increase in costs or prices for consumers, individual industries, Federal, State,
> local, or tribal government agencies, or geographic regions;
> (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or
> (D) significant impacts on multiple sectors of the economy.

This definition uses some of the same terminology as the definition of a "major rule" under the CRA, but (A) in the RAA focuses on an annual *cost* instead of an annual *effect* (which could include benefits and costs) on the economy of $100 million or more.[31] Additionally, the RAA would also adjust this amount for inflation. However, (B) and (C) are nearly identical to the definition of a "major rule" under the CRA. Additionally, a "major rule" under the RAA would include a rule that is likely to impose "significant costs on multiple sectors of the economy," which could potentially capture many rules not currently deemed to be "major rules" under the CRA. Both the RAA and the CRA determinations of what constitutes a "major rule," and thus what triggers additional procedures, are made by the OIRA Administrator. Determinations by the OIRA Administrator as to what constitutes a "major rule" in the CRA are not judicially reviewable. The RAA is silent as to whether determinations by the OIRA Administrator are judicially reviewable.

Subsection (A) of the RAA's definition of a "major rule" is also somewhat similar to portions of the definition of an economically significant regulatory action in E.O. 12866, which include actions that are "likely to result in a rule that may: (1) [h]ave an annual *effect* on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."[32] Like the CRA, E.O. 12866 references "effects," which can include costs and benefits, instead of just costs under the RAA. Executive Order 12866 also includes factors such as the "environment, public health or safety," which are not included in either the RAA or the CRA. As indicated earlier in this report, under E.O. 12866, economically significant regulatory actions must contain cost-benefit analyses and assess the costs and benefits of "reasonably feasible alternatives" to the planned rule.[33]

---

[31] The definition of a "major" rule in the CRA (5 U.S.C. §804(2)) is: "(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets."

[32] E.O. 12866, "Regulatory Planning and Review," 58 Fed. Reg. 51735 (Oct. 4, 1993) (§3(f)(1)(emphasis added)). While the RAA and the CRA reference "significant adverse effects" on competition, productivity, and employment, Executive Order 12866 uses the phrase "adversely affect in a material way" and references jobs instead of employment.

[33] §6(a)(3)(C).

"High-Impact" Rule

Defining "high impact" rules is a new concept that does not appear in the APA or the CRA. The RAA defines "high-impact" rules as those that the OIRA Administrator determines are "likely to impose an annual cost on the economy of $1,000,000,000 or more, adjusted annually for inflation." The RAA is silent as to whether determinations by the OIRA Administrator are judicially reviewable. Under the RAA, "high-impact" rules, like major rules, would be required to be issued under procedures in addition to those required for other, non-high-impact rules. These additional procedures include the issuance of an ANPRM, retrospective review requirements, time periods for the completion of interim rulemaking proceedings, and formal rulemaking procedures under 5 U.S.C. Sections 556 and 557, unless the formal rulemaking hearing is "waived by all participants in the rule making other than the agency." Presently, formal rulemaking is a rarely used process, and its requirements are only triggered when Congress explicitly requires that the rulemaking proceed "on the record."[34]

"Guidance"

The RAA defines guidance documents as "agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue." Although the APA does not define the term "guidance," guidance documents generally are considered to be a particular type of agency rule, known as a "general statement of policy." The RAA's definition of "guidance" is the same as the definition of "guidance document" in now-revoked E.O. 13422 and is essentially the same as the definition of "guidance document" in OMB's Final Bulletin on Agency Good Guidance Practices.[35]

"Major" Guidance

As the APA does not define "guidance," it also does not distinguish between "major guidance" and other guidance. The RAA defines a "major guidance" as:

> any guidance that the Administrator of [OIRA] finds is likely to lead to—
>
> (A) an annual cost on the economy of $100,000,000 or more, adjusted annually for inflation;
> (B) a major increase in costs or prices for consumers, individual industries, Federal, State, local or tribal government agencies, or geographic regions;
> (C) significant adverse effects on competition, employment, investment, productivity,

[34] 5 U.S.C. §553(c); United States v. Florida East Coast Railway, 10 U.S. 224 (1973).

[35] OMB, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). President Obama's E.O. 13497 revoked President Bush's E.O. 13422, which had made the further amendments to E.O. 12866, including the insertion of §3(g), which defined the phrase "guidance document." OMB's definition of the term "guidance document" included a reference to §3(g) in E.O. 12866, as further amended. Executive Order 12866 no longer contains a §3(g). Although the APA does not define the term "regulatory action," §3(e) of E.O. 12866 defines a "regulatory action" as "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking." The American Bar Association comments on H.R. 3010 had expressed concerns with the use of the phrase "regulatory action," as it does not appear in the APA. Letter from the American Bar Association's Section of Administrative Law and Regulatory Practice to Chairman Lamar Smith and Ranking Member John Conyers, Jr., Comments on H.R. 3010, the Regulatory Accountability Act of 2011, at 3 (Oct. 24, 2011), http://op.bna.com/env.nsf/id/thyd-8myq8q/$File/ABA%20Letter%20to%20Smith%20and%20Conyers.pdf [hereinafter ABA Comments].

> innovation, or on the ability of United States based enterprises to compete with foreign-based enterprises in domestic and export markets; or
>
> (D) significant impacts on multiple sectors of the economy.

While the RAA definition of "major guidance" contains some similarities to the definition of a "significant guidance document" in OMB's Final Bulletin on Agency Good Guidance Practices, subsection (A) in the above proposed definition focuses on an annual *cost* instead of an annual *effect* (which could include benefits and costs) on the economy of $100 million or more. Additionally, the RAA would adjust this amount for inflation. Subsection (B) also focuses on "a major increase in costs or prices" for consumers, industries, government agencies, and geographic regions, while the OMB Bulletin definition uses language for similar groups that the significant guidance document may "adversely affect in a material way."

Subsection (A) of the RAA's definition of a "major guidance" is also somewhat similar to portions of the definition of an "economically significant guidance document" in the OMB Bulletin, which include "significant guidance document[s] that may reasonably be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy, except that economically significant guidance documents do not include guidance documents on Federal expenditures and receipts." Under the OMB Bulletin, economically significant guidance documents are supposed to be issued in draft form for notice and comment, with certain exceptions.

The OMB Bulletin definition of a "significant guidance document" also includes documents that may reasonably be anticipated to "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." Subsection (C) in the RAA includes some similar factors to the OMB Bulletin definition, such as employment, investment, innovation, and the ability of the United States based enterprises to compete with foreign-based enterprises, does not include factors such as the "environment, public health or safety." Additionally, subsection (D) in the RAA definition would include a rule that is likely to impose "significant impacts on multiple sectors of the economy," which could potentially capture many guidance documents, as there is no definition of "significant" in the context of impacts.

A "major guidance" under the RAA and a "significant guidance document" under the OMB Bulletin require additional procedures for their issuance. Under the RAA, such procedures include an identification of costs and benefits, including costs that would be considered under a rulemaking; a description of alternatives to the guidance and the costs and benefits of such alternatives; required consultations with the OIRA Administrator; and publication by "by electronic means and otherwise." Under the OMB Bulletin, such procedures include agency approval of their issuance, a prohibition on the use of mandatory language unless describing statutory or regulatory requirements or addressing agency staff, and procedures for public access and comment. The RAA is silent as to whether determinations by the OIRA Administrator, as to what constitutes a "major guidance," are judicially reviewable.

Rulemaking (Section 3 of the RAA)

If enacted, the RAA would require agencies to follow several new steps in the preliminary stages of the rulemaking process (including determinations with regard to legal authorities and statutory considerations), perform various cost-benefit analyses, and examine regulatory alternatives. It would also add other requirements, such as hearings for high-impact rules and a requirement for OIRA to issue guidelines for agency compliance with rulemaking procedures. The following sections discuss the requirements in Section 3 of the RAA, which would essentially replace the typical "notice-and-comment" rulemaking procedures under the APA.

(b) Rule Making Considerations

The proposed RAA contains several "Rule Making Considerations" that agencies are required to consider when promulgating regulations. Specifically, the bill stipulates that agencies "shall make all preliminary and final determinations based on evidence and consider, in addition to other applicable considerations, the following…"

Although relevant rulemaking statutes such as the APA, RFA, and UMRA do not contain required "considerations" during the rulemaking process, E.O. 12866 does contain a similar section. Section 1(b) of the executive order is entitled "The Principles of Regulation," and it says that "To ensure that the agencies' regulatory programs are consisted with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable."[36]

This section of the report compares the "Rule Making Considerations" of the proposed RAA with the "Principles of Regulation" from E.O. 12866. Provisions in other statutes that require agencies to conduct regulatory impact analyses and meet other requirements are excluded since they explicitly require agency action, not just "considerations." Requirements for agency actions, such as cost-benefit analyses, are discussed later in the report.

(1) Legal Authority

The RAA would require agencies to consider "[t]he legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rulemaking." While such requirements to *consider* the legal authority for a rulemaking are not explicitly delineated in the APA, it is likely that agencies already consider their legal authority in determining whether to issue a rule, and the APA requires agencies to *reference* the legal authority for the rule in the NPRM.[37]

As a general matter, the Supreme Court has stated that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[38] Agencies may use their discretion in determining whether to initiate a rulemaking, and may issue rules based on a general grant of rulemaking authority, which is "limited to the

[36] Executive Order 12866 generally does not apply to independent regulatory agencies. The components of Executive Order 12866 that do apply to the independent regulatory agencies are Section 4(b), which established the Unified Regulatory Agenda and Section 4(c), which established the Regulatory Plan. The other requirements, including those for OIRA review and cost-benefit analysis, do not apply to the independent regulatory agencies. The executive order uses the definition of "independent regulatory agency" established in the Paperwork Reduction Act (44 U.S.C. §3502).

[37] 5 U.S.C. §553(b)(2).

[38] Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 151 (2000).

authority delegated by Congress."[39] Agencies may also issue rules based on a specific statutory requirement to promulgate a rule, which may or may not include a deadline for the rule's issuance.[40]

(2) Other Statutory Considerations

The RAA also would require agencies to consider "[o]ther statutory considerations applicable to whether the agency can or should propose a rule or undertake other agency action." Such statutory considerations could appear in many forms, such as a directive for an agency to issue a rule, advisory opinion, or guidance document for a particular issue. Statutory considerations as to whether the agency should propose a rule or take other action could also include an appropriations rider stating that an agency may not use funds to finalize certain provisions of a proposed rule.[41]

Although not quite a comparable directive to that in the RAA, E.O. 12866 contains principles to which the agencies "should adhere … to the extent permitted by law and where applicable" in its section on "The Principles of Regulation." Additionally, the E.O. requires agencies to seek views of, assess the effects of regulations on, and minimize burdens that uniquely affect state, local, and tribal governments. E.O. 12866 also calls for the harmonization of federal regulations, as appropriate, with state, local, and tribal regulations and mandates that agencies draft rules in a manner that makes them "easy to understand" and minimizes the "potential for uncertainty and litigation arising from uncertainty."

(3) Nature of Problem to Be Addressed

The proposed RAA states that agencies should consider the "specific nature and significance of the problem" the rule intends to address, as well as "whether the problem warrants new agency action." This is similar to the language in Section 1(b)(1) E.O. 12866, which says that "Each agency shall identify the problem that it intends to address."

(4) Existing Regulations

The fourth rulemaking consideration in the proposed RAA says that agencies should consider "Whether existing rules have created or contributed to the problem the agency may address with a rule and whether those rules could be amended or rescinded to address the problem in whole or in part."

Similarly, Section 1(b)(2) of E.O. 12866 says that "Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively." In addition, Section 1(b)(10) instructs that "Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies."

---

[39] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); *see id.* at 213 ("The statutory provisions establishing the Secretary's general rulemaking power contain no express authorization of retroactive rulemaking.").

[40] *See, e.g.*, P.L. 111-203, §1502(b) ("Not later than 270 days after the enactment of this subsection, the Commission shall promulgate regulations....").

[41] *See, e.g.*, P.L. 112-55, §721 ("*Provided*, That no funds be made available by this or any other Act to publish a final or interim final rule in furtherance of, or otherwise implement, proposed sections 201.2(l), 201.2(t), 201.2(u), 201.3(c), 201.210, 201.211, 201.213, or 201.214 of 'Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act' (75 Fed. Reg. 35338 (June 22, 2010)).").

(5) Regulatory Alternatives

The fifth rulemaking consideration in the RAA would require agencies to consider "any reasonable alternatives" to a rule. This includes alternatives such as no federal response; amending or repealing existing rules; regulatory responses at the state or local level; and other potential responses that would specify performance objectives, establish economic incentives, inform choices made by the public, or incorporate other "innovative alternatives."

Similar guidance found in E.O. 12866 (Section 1(b)(8)) says that agencies should consider "alternatives forms of regulation" and that they should "specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." In addition, E.O. 12866 Section 1(b)(3) says that agencies shall "identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public." Executive Order 13563 contains an identical provision in Section 1(b)(5), stressing that agencies should consider "alternatives to direct regulation."[42]

(6) Costs and Benefits, Cost-Effectiveness, and Incentives

The final consideration that agencies would be required to take into account when regulating pertains to the costs of rules. When performing cost-benefit analyses, which are required in later provisions of the bill, agencies would be expected to consider the items listed in this section.

Under the RAA, agencies would be required to consider "the potential costs and benefits associated with potential alternative rules and other responses considered," including "direct, indirect, and cumulative costs and benefits and estimated impacts on jobs (including an estimate of the net gain or loss in domestic jobs),[43] economic growth, innovation, and economic competitiveness." They would also be required to consider "means to increase the cost-effectiveness" of a rule, as well as "incentives for innovation, consistency, predictability, lower costs of enforcement and compliance (to government entities, regulated entities, and the public), and flexibility."

The language in the proposed RAA is similar in some respects to the language in E.O. 12866 Section 1(b)(5), which requires an agency to "design its regulations in the most cost-effective manner to achieve the regulatory objective" and to "consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity." Section 1(b)(6) requires agencies to "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Finally, Section 1(b)(11) requires agencies to "tailor [their] regulations to impose the least burden on society," while "obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."

Section 1(b)(2) of E.O. 13563 also encourages agencies to "tailor [their] regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;" and to "select, in choosing among alternative regulatory approaches, those approaches that maximize net

[42] 76 Fed. Reg. 3821 (Jan. 21, 2011). In sum, E.O. 13563 essentially reaffirmed the principles of E.O. 12866 and began a government-wide review of existing regulations.

[43] This provision in parentheses was added as an amendment when the RAA was under consideration on the House floor.

benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity)."

Perhaps one of the main differences between the RAA's consideration of costs and the current considerations found in executive orders is that the RAA has no comparable suggestion that agencies consider "distributive impacts" or "equity." OMB Circular A-4, which provides best practices and guidance to agencies on how to perform cost-benefit analysis, states that "those who bear the costs of a regulation and those who enjoy its benefits often are not the same people. The term 'distributional effect' refers to the impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography)." Under OMB Circular A-4, agencies are supposed to provide a separate description of distributional effects so that "decision makers can properly consider them along with the effects on economic efficiency … you should be alert for situations in which regulatory alternatives result in significant changes in treatment or outcomes for different groups."[44] It is not entirely clear how or whether OIRA would harmonize Circular A-4 with new guidance that it would be required to issue under the RAA or whether OIRA would continue to direct agencies to consider the distributional effects of a rule.

In sum, many of the "considerations" that the RAA would add to the regulatory process are similar to considerations already in place. However, they would appear to be used differently.[45] Since the most comparable requirement for the RAA's considerations is the "The Principles of Regulation" section of E.O. 12866, which was subsequently reinforced by E.O. 13563, which does not cover independent regulatory agencies. However, many of those independent regulatory agencies may have their own requirements for considerations in their own establishing statutes.[46]

(c) Advance Notice of Proposed Rulemaking (ANPRM) for Major Rules, High-Impact Rules, and Rules Involving Novel Legal or Policy Issues

The APA does not require an ANPRM for any rule, although some statutes do require ANPRMs for specific agencies.[47] The RAA would add an ANPRM requirement for major rules, high-impact rules, and rules involving "novel legal or policy issue[s] arising out of statutory mandates." The RAA does not define what would constitute a rule that involves a "novel legal or policy issue arising out of statutory mandates," and as a result, this phrase could conceivably capture many rules that an agency promulgates. ANPRMs for novel legal or policy issue rules would also be required to identify "the nature of and potential reasons to adopt the novel legal or policy position upon which the agency may base a proposed rule." As the RAA does not specify whether its

[44] OMB Circular A-4, http://www.whitehouse.gov/omb/circulars_a004_a-4/.

[45] See section below entitled "Final Rules: Requirement for Least Costly Rule."

[46] For example, the National Securities Market Improvement Act (15 U.S.C. §77b(b)) requires the Securities and Exchange Commission (SEC) to consider whether an action "will promote efficiency, competition, and capital formation" whenever it is "engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest."

[47] *See, e.g.*, 15 U.S.C. §2058(a). This Consumer Product Safety Commission (CPSC) statute provides that proceedings for consumer product safety rules may only be commenced by the publication of an ANPRM that must include certain information, such as the product and the "nature of the risk of injury associated" with such product, as well as invitations to submit comments "with respect to the risk of injury identified by" the CPSC, "regulatory alternatives being considered, and other possible alternatives for addressing the risk" during a period of between 30 and 60 days after the date of publication of the ANPRM.

requirements for ANPRMs would apply "notwithstanding any other provision of law," it is possible that major, high-impact, or novel legal or policy rules that are issued by an agency with separate statutory requirements for an ANPRM would have to adhere to both sets of requirements. Additionally, the RAA's requirements for an ANPRM would apply if an agency chose to conduct a negotiated rulemaking for a major, high-impact, or novel legal or policy issue rule. Negotiated rulemaking, in brief, is a collaborative process that uses a committee with interested persons and agency representatives, which, if it achieves a consensus on a proposed rule, then transmits a report with its proposed rule to the agency.[48]

The RAA-required ANPRM would need to be published in the *Federal Register* a minimum of 90 days before the agency publishes an NPRM in the *Federal Register*. Additionally, the bill would add a 60-day minimum time period for comment on the ANPRM. The RAA delineates what agencies must include in these ANPRMs, such as a written statement of the "nature and significance of the problem," "data and other evidence and information on which the agency expects to rely," the "legal authority" for the rule, whether it is statutorily mandated or whether the agency has discretion to start the rulemaking process, whether the rule has a deadline, and preliminary information about the other RAA-specified rulemaking considerations. The RAA would not require an ANPRM before the publication of an NPRM, if, in its "determination of other agency course" under the RAA's NPRM requirements, the agency "makes a determination to amend or rescind an existing rule."[49]

(d) Notices of Proposed Rule Making (NPRM); Determinations of Other Agency Course

The RAA would expand and change the requirements for the notice and comment procedures currently found in the APA.

NPRM: Publication Requirement

The APA presently requires that NPRMs be published in the *Federal Register* unless the person subject to the rule is personally served or has actual notice of the rule. The RAA, unlike the APA, does not specifically require the publication of NPRMs in the *Federal Register*. The RAA states that "the agency shall publish" but does not specify where the agency should publish its NPRM. Under the RAA, the agency would not be able to publish an NRPM until after the agency issued its ANPRM (if so required because the rule is a major rule, a high-impact rule, or a rule involving novel legal or policy issues arising out of statutory mandates) and after the agency consults with the OIRA Administrator.

NPRM: OIRA Review/Consultation

The RAA requires that before an agency issues a proposed rule, and after the issuance of an ANPRM, if necessary, the agency shall consult with the Administrator of OIRA.

Currently, under E.O. 12866, agencies (other than independent regulatory agencies) are required to submit "significant" proposed rules and final rules to OIRA, along with an assessment of costs and benefits. "Significant" rules are defined in the executive order as follows:

> Any regulatory action that is likely to result in a rule that may

[48] 5 U.S.C. §566(f).

[49] H.R. 3010, §3(b)(proposed §553(d)(2)(B)).

> (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
> (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
> (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
> (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

Thus, if enacted, the RAA would change the current requirement for the submission of information to OIRA during the rulemaking process in three ways. First, the requirement would no longer be to provide rules and related materials to OIRA, but it would be to consult with OIRA. Second, the bill would require consultation with OIRA for *all* rules, not just the rules deemed to be "significant." Third, the bill would require all agencies, including independent regulatory agencies, to consult with OIRA (as mentioned previously, the independent regulatory agencies are not currently covered by the requirement to consult with OIRA).

It is unclear how this requirement to "consult" with OIRA would be interpreted. Currently, agencies send their rules and cost-benefit analyses to OIRA for review under the requirements in E.O. 12866. If OIRA suggests changes to those rules or the analyses, agencies generally comply and make the suggested changes. If OIRA does not approve of a rule or the accompanying cost-benefit analysis and wants to attempt to put a stop to the rule, it may issue a "return letter" to the agency, returning the rule to an agency for "reconsideration."[50] Generally, if a return letter is issued, agencies will not proceed with issuing the rule.[51]

Whether the RAA would enact into law the authority of OIRA essentially to put a stop to rulemaking proceedings is unclear. However, if a President were to interpret this provision as granting OIRA the authority to put a stop to a rulemaking proceeding, this provision could result in an increased level of presidential control over agency rulemaking.

Furthermore, if a President were to interpret the provision as granting OIRA the authority to put a stop to a rulemaking proceeding, there could also be significant implications for the independent regulatory agencies. As previously discussed, those agencies are not currently covered by the executive order requirements for OIRA review. By extending OIRA review to those agencies and giving OIRA (and by extension, the President) the potential authority to put a stop to rulemaking proceedings, that provision could decrease the independence of those agencies.

NPRM: Notice Requirement

The RAA's proposed requirements for the notice portion of the NPRM mirror some of the existing requirements under the APA. For example, the APA requires, and the RAA would require NPRMs to include a statement of the time, place, and nature of the rulemaking proceedings[52] and references to the legal authority for the proposed rule.[53] The APA allows an NPRM to contain

[50] *See, e.g.*, John. M. Broder, *Re-election Strategy is Tied to a Shift on Smog*, N.Y. Times (Nov. 16, 2011).

[51] E.O. 12866 does not explicitly grant OIRA the power to disapprove a draft rule and prevent an agency from issuing the rule. However, agencies generally do not publish rules returned to them by OIRA, and they generally accept the suggested changes made to rules during OIRA review.

[52] "This language requires the agency to specify the type of rule involved; the time during which the agency will receive comments on the proposal; and instructions regarding the manner of filing comments." JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 278 (4th ed. 2006).

[53] *See* Global Van Lines, Inc. v. Interstate Commerce Commission, 714 F.2d 1290, 1297-98 (5th Cir. 1983); National

"either the terms *or substance* of the proposed rule or a description of the subjects and issues involved,"[54] but the RAA would require the NPRM to include the terms of the proposed rule. Most agencies currently publish the language of the proposed rule, and courts will evaluate whether the agency's notice was adequate "by determining whether it would fairly apprise interested persons of the 'subjects and issues' before the agency."[55]

The RAA's NPRM requirements also would include a description "of information known to the agency on the subject and issues of the proposed rule," and a "reasoned preliminary determination of need for the rule" based on such information. Such a description of information known to the agency about the rulemaking considerations previously outlined could be quite broad, and the RAA requires this description for four types of information: (i) a summary of information known to the agency concerning the rulemaking considerations that the RAA would require, (ii) a summary of additional information the agency provided to and obtained from interested persons under the ANPRM requirements of the RAA, (iii) a summary of any preliminary risk assessment or regulatory impact analysis performed by the agency, and (iv) information specifically identifying all data, studies, models, and other evidence or information considered or used by the agency in connection with the determination by the agency to propose the rule. With regard to the RAA's requirement that the agency publish a summary of any regulatory impact analysis by the agency, the RFA requires the publication of the agency's initial regulatory flexibility analysis, or a summary, in the *Federal Register* when the agency publishes its NPRM. An NPRM under the RAA also would state whether the rule is mandated by statute.

NPRM: Costs and Benefits

Like the requirements for interaction with OIRA, the RAA would broaden the requirements for cost-benefit analysis. The RAA would extend the requirements to all rules, not just rules deemed to be "significant," as is the current policy under E.O. 12866. Second, the RAA would also extend the requirement for cost-benefit analysis to the independent regulatory agencies. The independent regulatory agencies are not currently covered under the cost-benefit analysis requirements of E.O. 12866, which contains the most broadly applicable cost-benefit analysis requirements.[56] In addition, the RAA contains specific information about what cost-benefit analysis would involve and how it would be used (see section on "(b) Rule Making Considerations" entitled "(6) Costs and Benefits, Cost-Effectiveness, and Incentives").

The relevant text from the RAA reads that an agency shall include in its notice of proposed rule making "(F) a reasoned preliminary determination that the benefits of the proposed rule meet the relevant statutory objectives and justify the costs of the proposed rule (including all costs to be considered under subsection (b)(6) [potential costs and benefits of alternative rules]), based on the information described under subparagraph (D) [information known to the agency on the subject]."

Tour Brokers Ass'n v. United States, 591 F.2d 896, 900 (D.C. Cir. 1978).

[54] 5 U.S.C. §553(b)(3)(emphasis added).

[55] Prometheus Radio Project v. FCC, 652 F.3d 431, 449 (3d. Cir. 2011)(quoting Prometheus Radio Project v. FCC, 373 F.3d. 372, 411 (3d. Cir. 2004)(citing Am. Iron & Steel Inst. v. EPA, 568 F.2d 284, 293 (3d. Cir. 1977)).

[56] Although the independent regulatory agencies are not covered by the executive order, some of those agencies do have their own individual requirements for considerations of costs when promulgating rules. For further information, see pp. 16-23 of CRS Report R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, by Maeve P. Carey.

Section 6(a)(3)(B) of E.O. 12866 requires covered agencies to assess costs and benefits for "significant" regulatory actions. Specifically, agencies are required to provide to OIRA a general "assessment of the potential costs and benefits of the regulatory action." Section 6(a)(3)(C) requires agencies to perform a full cost-benefit analysis for "economically significant" rules.[57] This requirement for "economically significant" rules is for a more detailed analysis of costs and benefits. Agencies are required to provide to OIRA:

> (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
>
> (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
>
> (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

In addition to the requirements to consider costs and benefits at the proposed rule stage under E.O. 12866, agencies are also required to carry out regulatory impact analyses, which look at the potential impacts of rules and may be similar to cost-benefit analyses under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.

The RFA requires federal agencies to assess the impact of their forthcoming regulations on "small entities," which the act defines as including small businesses, small governmental jurisdictions, and some small not-for-profit organizations. Under the RFA, which applies to Cabinet departments and independent agencies as well as independent regulatory agencies, agencies have to consider whether a rule is expected to have a "significant economic impact on a substantial number of small entities." If the agency makes such a determination, the agency must prepare a "regulatory flexibility analysis" when formulating a proposed rule. A summary of the initial regulatory flexibility analysis must be published in the *Federal Register* when the proposed rule is published.[58] There is a similar requirement for a regulatory flexibility analysis at the final rule stage.

UMRA requires agencies to publish impact statements with their proposed rules as well. UMRA's requirements apply when an agency is promulgating a rule containing a mandate that may result in the expenditure of $100 million or more in any one year by the private sector, or by state, local, and tribal governments in the aggregate. When that qualification is triggered, UMRA requires agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to prepare a written statement containing among other things a "qualitative and

[57] "Economically significant" rules are defined in Section 3(f)(1) of the executive order as those that "Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."

[58] 5 U.S.C. §603(a).

quantitative assessment of the anticipated costs and benefits ... as well as the effect of the Federal mandate on health, safety, and the natural environment."[59] Agencies are required to include this information when issuing a proposed (or final) rule.

NPRM: Regulatory Alternatives

If enacted, the RAA would require agencies to include in their notice of proposed rulemaking a detailed discussion of the alternatives to the proposed rule. The discussion would be required to include the costs and benefits of those alternatives (including direct, indirect, and cumulative costs and benefits); whether each of the alternatives would meet the statutory objectives; and why the agency did not select any of those alternatives. This requirement is similar to some requirements in statute and executive orders for agencies to consider alternative regulatory options. However, the RAA provision would apply more broadly than any of the current requirements for those considerations. It appears that the RAA would require agencies to include more detailed information than is currently required when discussing alternative options.

Currently, under E.O. 12866, covered agencies are required to provide to OIRA:

> An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

In addition, for rules that an agency determines may have a "significant economic impact on a substantial number of small entities," the RFA requires that in their initial flexibility analyses, agencies include "a description of any significant alternatives to the proposed rule which accomplish the states objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[60]

Section 205(a) of UMRA requires agencies, when promulgating a rule that contains a mandate that may result in the expenditure of $100 million or more in any one year by the private sector, or by state, local, and tribal governments in the aggregate, to "identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule."

NPRM: Existing Regulations

In agencies' notices of proposed rulemaking, the RAA would require agencies to include "a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule." If the agency determines that situation to be the case, then the agency must also explain whether and why the agency proposes to amend or rescind those rules.

Currently, the "considerations" of E.O. 12866 instruct covered agencies to look at existing regulations and whether they contribute to or create the problem that the regulation is attempting to solve.[61] However, E.O. 12866 does not have a comparable requirement to the RAA's requirement of publication of a statement along with its proposed rule.

[59] 2 U.S.C. §1532(2).

[60] 5 U.S.C. §603(c).

[61] 58 Fed. Reg. 51735 (Oct. 4, 1993) (§1(b)(2)).

NPRM: Disclosure Requirements in Connection with an Agency's Determination to Propose a Rule

The RAA would change the current procedures for disclosure by changing the requirements for publication of information on consultations between OIRA and an agency. Executive Order 12866 requires OIRA to disclose certain information about its regulatory reviews, including information about meetings and communications exchanged during the review process. It also imposes transparency requirements upon the agencies, including requirements to make its cost-benefit information public and identify changes made to the rule.[62]

The RAA would require the agency to make public all information used in the formulation of the NPRM. However, the RAA would give the President and the Administrator of OIRA substantial discretion over what information is provided with regard to consultation between OIRA and the agency:

> All information provided to or considered by the agency, and steps to obtain information by the agency, in connection with its determination to propose the rule, including any preliminary risk assessment or regulatory impact analysis prepared by the agency and other information prepared or described by the agency under subparagraph (D) and, at the discretion of the President or the Administrator of [OIRA], information provided by that Office in consultations with the agency, shall be placed in the docket for the proposed rule and made accessible to the public by electronic means and otherwise for the public's use when the notice of proposed rule making is published.

The RAA contains a similar provision on the disclosure of information pertaining to the agency's determination to issue a proposed rule as well as the agency's determination of "other agency course," should an agency decide not to proceed with the issuance of a rule. In addition, similar language later in the bill would create a requirement for the agency to disclose "all documents and information prepared or considered by the agency during the proceeding." In each variation on this provision, the OIRA Administrator is granted discretion over what to include in the docket pertaining to communications between OIRA and the agency. If the OIRA Administrator chose to use that discretion to exclude from the docket information about OIRA's communications with the agency, this provision could be considered to result in a lack of transparency in the rulemaking process.[63]

NPRM: Determination of Other Agency Course

Under the RAA, if the agency decides not to issue an NPRM and instead chooses "other agency course," the agency is required to publish (after consultation with OIRA) a "notice of determination of other agency course," which "shall include information required by paragraph (1)(D) [information known to the agency on the subject, including information and costs and benefits] to be included in a notice of proposed rule making and a description of the alternative response the agency determined to adopt." Currently, if an agency chooses not to move forward with a proposed rule, there is no comparable requirement for issuing a notice (though an agency may choose to do so).

---

[62] See *id.* at §6(b)(4) for OIRA's transparency requirements and §6(a)(3)(E) for the agencies' transparency requirements.

[63] *See generally* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Lisa Schultz Bressman and Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

NPRM: Amending or Repealing Rules

If an agency decides to amend or repeal a rule, under the RAA, the requirements for an ANPRM would not apply. However, an agency determination to amend or rescind an existing rule would still necessitate an NPRM, as is currently the case under the APA. Given the RAA's exception for publication of an ANPRM in this instance, it appears that the RAA places more priority on advance notice for "new" rules and less on rulemaking that would change or eliminate a rule.

NPRM: Disclosure Requirements in Connection with an Agency's Determination of Other Agency Course

The requirements for agencies to disclose information in connection with their determination of "other agency course" are similar to those discussed above in the section entitled "NPRM: Disclosure Requirements in Connection with an Agency's Determination to Propose a Rule." The agency must disclose information used in its decision to choose "other agency course," and OIRA and the President have discretion over which communications between the agency and OIRA to include in the docket.

Even if an agency decides not to move forward with a rule, it is still required to publish "all information provided to or considered by the agency, and steps to obtain information by the agency … including but not limited to any preliminary risk assessment or regulatory impact analysis prepared by the agency and all other information" along with its determination of "other agency course."

Comment Period Requirement and Duration of Comment Period

If enacted, the RAA would add minimum time periods for comment—120 days for major or high-impact rules and 60 days for all other rules, which would appear to include rules involving "a novel legal or policy issue arising out of statutory mandates." This would be a significant change from the APA, which does not have a minimum time period for comments. However, individual statutes may require minimum time periods[64] and Executive Orders 12866 and 13563 both specify that agencies generally should provide a comment period of at least 60 days. These executive orders do provide agencies with flexibility, however, as E.O. 12866 qualifies its recommendation with the phrase "in most cases," and E.O. 13563 states that "to the extent feasible and permitted by law," agencies shall allow for a comment period "that should generally be at least 60 days."

Comments: Opportunity for Oral Presentations

The APA grants agencies discretion as to whether the comment period should include an opportunity for oral presentation. Under the RAA, a member of the public may petition, under existing APA hearing procedures,[65] for a hearing "to determine whether any evidence or other information upon which the agency bases the proposed rule fails to comply with the Information Quality Act." If the agency decides not to exclude the evidence in question, the agency must "grant any such petition that presents a prima facie case that evidence or other information upon which the agency bases the proposed rule fails to comply with the [IQA]" and hold a hearing within 30 days of receiving the petition. In such instances, under the RAA, the agency must offer

[64] *See, e.g.*, P.L. 111-148, §1104(b) ("The Secretary shall accept and consider public comments on any interim final rule published under this paragraph for 60 days after the date of such publication.").

[65] 5 U.S.C. §556. The RAA would incorporate the hearing procedures stated in 5 U.S.C. §556, which essentially require an administrative law judge to preside over a hearing and discuss burdens of proof and the record for the decision.

an opportunity for comments in the form of oral presentations pursuant to the required hearing. Similarly, if a hearing under the RAA would be required because the proposed rule is a high-impact rule, then an opportunity for comments in the form of oral presentations would be offered pursuant to that hearing.

Formal Rulemaking

Under the APA, "when rules are required by statute to be made *on the record* after opportunity for an agency hearing," the formal rulemaking requirements of 5 U.S.C. Sections 556 and 557 apply.[66] When formal rulemaking is required, the agency must engage in trial-like procedures. The agency, therefore, must provide a party with the opportunity to present his case through oral or documentary evidence and conduct cross-examinations.[67] Formal rulemaking proceedings must be presided over by an agency official or Administrative Law Judge who traditionally has the authority to administer oaths, issue subpoenas, and exclude "irrelevant, immaterial, or unduly repetitious evidence."[68] Formal rulemaking procedures also prohibit *ex parte* (off-the-record) communications between interested persons outside the agency and agency officials involved in the rulemaking process.[69] The agency or proponent of the rule has the burden of proof, and such rules must be issued "on consideration of the whole record … and supported by … substantial evidence."[70] Executive Order 12866 specifically excludes rules issued under formal rulemaking proceedings from its requirements.

Under the RAA, if formal rulemaking is required by a statute that calls for a rulemaking "on the record"[71] or if the agency chooses to conduct a formal rulemaking, then the procedures for a petition for an IQA hearing, which would be in accordance with 5 U.S.C. Section 556 formal rulemaking hearing procedures, would not apply. Additionally, the requirements of high-impact rule hearings "to receive comment outside of" formal rulemaking procedures would not apply, although the RAA's proposed Section 553(e) does not appear to discuss the receipt of comments outside of formal rulemaking procedures for high-impact rules hearings. Finally, under the RAA, a high-impact rule hearing is limited to several issues of fact, including "upon petition by an interested person who has participated in the rulemaking, other issues relevant to the rulemaking." If a formal rulemaking was conducted, such RAA-established petition procedures would not be applicable.

Petition for Information Quality Act Hearing

Presently, the IQA requires federal agencies to create "administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with guidelines" issued by OMB on the quality, objectivity, utility, and integrity of information.[72] A 2002 OMB Memorandum on Information Quality Guidelines provides that agency websites should explain how a person may file a request for correction and

[66] 5 U.S.C. §553(c)(emphasis added). The Supreme Court has interpreted this language very narrowly, determining that formal rulemaking requirements are only triggered when Congress explicitly requires that the rulemaking proceed "on the record." United States v. Florida East Coast Railway, 10 U.S. 224 (1973).

[67] 5 U.S.C. §556(d).

[68] 5 U.S.C. §556(c)-(d).

[69] 5 U.S.C. §557(d)(1).

[70] 5 U.S.C. §556(d).

[71] 5 U.S.C. §553(c); United States v. Florida East Coast Railway, 10 U.S. 224 (1973).

[72] P.L. 106-55, §515.

information on administrative appeals of the agency's response to the request.[73] The memorandum notes that current APA public comment procedures "provide well-established procedural safeguards that allow affected persons to contest information quality on a timely basis [and that] agencies may use those procedures to respond to information quality complaints," but that agencies "should respond sooner where needed to avoid the potential for actual harm or undue delay."[74] Additionally, the OMB memorandum notes that agencies should issue a written response within 60 calendar days to complaints and appeals.[75] As to judicial review under the IQA, the IQA's statutory language does not explicitly mention judicial review and courts have stated that "Congress did not intend the IQA to provide a private cause of action."[76]

The RAA does not mention existing agency mechanisms for corrections of information. The bill would allow for petitions under existing APA hearing requirements in 5 U.S.C. Section 556, within 30 days of an NPRM, "to determine whether any evidence or other information upon which the agency bases the proposed rule fails to comply with the" IQA. Under the RAA, the agency would either (1) "exclude from the rulemaking the evidence or other information that is the subject of the petition," (2) grant the petition if it "presents a prima facie case" that such evidence or information does not comply with the IQA, or (3) "deny any petition that [the agency] determines does not present such a prima facie case." If the agency excludes the information, it may, "if appropriate," withdraw the proposed rule and publish its determination. If the agency grants the petition, it must hold the hearing within 30 days of receiving the petition, allow for cross-examination, and "decide the issues presented by the petition" within 60 days of receiving the petition. The agency must also publish a notice in the *Federal Register* of a hearing on the petition at least 15 days before the hearing, indicating the time, place, proposed rule, and issues to be considered. The RAA's 60-day decision timeframe is similar to OMB's suggested response time of 60 calendar days for complaints and appeals.

The RAA would provide for judicial review of agency dispositions of issues "considered and decided or determined" with regard to whether the petition presents a prima facie case and the issues presented by the petition, but not until judicial review of the agency's final action (such as the issuance of a final rule). The RAA also provides that if the agency decides to withdraw a proposed rule "on the basis of the petition," that there is no judicial review of such agency determinations. However, if an individual does not petition for an IQA hearing in the first place, judicial review would not be precluded under the RAA for "any claim based on" the IQA.

(e) Hearings for High-Impact Rules

As the APA does not distinguish or define "high-impact" rules, no hearing requirements or other procedures exist under the APA (or other statutes or executive orders) for such rules. Executive Order 12866 specifically excludes rules issued under formal rulemaking proceedings from its requirements.

---

[73] Memorandum from John D. Graham for the President's Management Council on Agency Final Information Quality Guidelines (Sept. 5, 2002), http://m.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/pmcmemo.pdf.

[74] *Id.*

[75] *Id.*

[76] Habitat for Horses v. Salazar, 2011 U.S. Dist. LEXIS 107267, *21-*22 (S.D.N.Y. 2011); *In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1174-75 (D. Minn. 2004), *aff'd in part and vacated in part on other grounds*, 421 F.3d 618 (8th Cir. 2005). The ABA notes that while "[t]he weight of judicial authority indicates that the IQA creates no rights that are capable of being enforced in the first place, … [t]his issue has not been definitively resolved." ABA Comments, *supra* note 35, at 25-26.

The RAA would create new hearing requirements for high-impact rules, based upon existing APA formal rulemaking requirements under 5 U.S.C. Sections 556 and 557, discussed above under "Formal Rulemaking." The RAA would require agencies to hold a hearing under Sections 556 and 557 after an NPRM, the receipt of comments, and an IQA hearing (if one is held), unless the high-impact rule hearing "is waived by all participants in the rulemaking other than the agency." The agency must publish notice of the hearing at least 45 days before the hearing indicating the time, place, proposed rule, and issues to be considered at the hearing.

The high-impact rule hearing must be limited to six issues of fact, but "participants may waive determination of any such issue": (1) "Whether the agency's asserted factual predicate for the rule is supported by the evidence"; (2) whether an alternative to the rule "would achieve the relevant statutory objectives at a lower cost"; (3) which alternative, if there is more than one, "would achieve the relevant statutory objectives at the lowest cost"; (4) "Whether, if the agency proposes to adopt a rule that is more costly than the least costly alternative," the "additional benefits of the more costly rule exceed the additional costs of the more costly rule"; (5) "Whether the evidence and other information upon which the agency bases the proposed rule meets the requirements of" the IQA; and (6) "other issues relevant to the rulemaking," if an interested person who participated in the rulemaking petitioned and the agency did not "determine[] that consideration of the issues at the hearing would not advance consideration of the rule or would … unreasonably delay completion of the rulemaking." The agency would have 30 days to grant or deny such a petition.

(f) Final Rules

Final Rules: OIRA Review/Consultation

The RAA would require agencies, including independent regulatory agencies, to "consult" with OIRA before adopting a final rule. The RAA requires that "the agency shall adopt a rule only following consultation with the Administrator of the Office of Information and Regulatory Affairs to facilitate compliance with applicable rule making requirements."

Currently, as in the case for proposed rules, covered agencies are required under E.O. 12866 to submit their significant final rules for OIRA review. Thus, the RAA would substantially expand the requirements for OIRA review in two respects: first, it would require consultation with OIRA for all agencies, including independent regulatory agencies, which are not covered in that section of E.O. 12866. Second, the consultation requirement would extend to all agency rules, not just rules deemed to be "significant."[77]

Final Rules: Scientific Basis

The RAA also would require that agencies "shall adopt a rule only on the basis of the best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule."

Although there is not a specific requirement in statute for agencies to adopt rules based upon scientific evidence, the proposed language in the RAA is almost identical to language from the "Principles of Regulation" section of E.O. 12866: "Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the

[77] See section above entitled "NPRM: OIRA Review/Consultation" for the definition of "significant" rules.

need for, and consequences of, the intended regulation."[78] Similarly, E.O. 13563 also contains language saying that "our regulatory system … must be based on the best available science."

Final Rules: Requirement for Least Costly Rule

The RAA would require agencies to adopt the "least costly" rule that meets "relevant statutory objectives" unless the benefits justify additional costs:

> Except as provided in subparagraph (B), the agency shall adopt the least costly rule considered during the rule making (including all costs to be considered under subsection (b)(6)) that meets relevant statutory objectives.
>
> The agency may adopt a rule that is more costly than the least costly alternative that would achieve the relevant statutory objectives only if the additional benefits of the more costly rule justify its additional costs and only if the agency explains its reason for doing so based on interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule.

Thus, a determination first would need to be made regarding what the "relevant statutory objectives" are. Then an agency is directed to choose the least costly option for accomplishing these objectives. Agencies could deviate from this presumption, but must justify that deviation as explained in the provision.

Because statutes sometimes have goals that are vague or that may not be explicitly laid out in the statute, this decision rule would appear to allow for the use of discretion in some cases in determining the relevant statutory objectives. It is not clear how agencies would use such discretion, or whether OIRA may have authority or may attempt to influence agencies' determinations of relevant statutory objectives.

In its "Principles of Regulation" section, E.O. 12866 calls for agencies to tailor their regulations to impose the "least burden on society," although it also instructs agencies to "select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."[79] E.O. 13563 contains similar language.

The APA does not contain such a requirement, although for rules expected to require the expenditure of $100 million or more in any one year by the private sector, or by state, local, and tribal governments in the aggregate, UMRA requires that agencies select the "least costly, most cost-effective or least burdensome alternatives that achieves the objectives of the rule."[80]

The requirement for agencies to choose a regulatory alternative that is the least costly would shift the current presumption that agencies are required to select regulatory alternatives that maximize net benefits to the presumption that the decision would instead be based primarily on costs. For analysis on some of the potential implications from the requirement for agencies to choose the least costly rule, see the section below entitled "Requirement for Choosing Least Costly Rule."

[78] 58 Fed. Reg. at 51736 (§1(b)(7)).

[79] 58 Fed. Reg. at 51736 (§1(b)(11)).

[80] 2 U.S.C. §1535(a).

Final Rules: Publication Requirement

The RAA would introduce a number of items that agencies must include with the publication of a final rule in the *Federal Register*. Currently, under the APA, agencies are required to publish along with the final rule a "concise general statement of their basis and purpose."[81]

Under the RAA, agencies would be required to include several detailed explanations along with the final rule. As under the APA, agencies would be required to include "a concise, general statement of the rule's basis and purpose." In addition to that requirement, agencies would be required to include an explanation of the need for a rule, including a statement of the statutory requirement and a summary of any "final risk assessment or regulatory impact analysis prepared by the agency." Agencies would also be required to include an explanation that the benefits "meet the relevant statutory objectives and justify the rule's costs." They must also include a detailed statement on the alternatives that the agency did *not* select, along with a justification for selecting the alternative that was chosen. In addition, they must discuss the state of existing rules on the particular topic and what they intend to do with those existing rules, if anything. Finally, agencies must include a determination that the evidence and information used in its formulation and selection of the rule is in accordance with the Information Quality Act.

In some limited instances, agencies are required under current law to publish other items along with the final rules and the statement of basis and purpose, but not to the extent of the RAA's proposed requirements. For rules covered under the RFA, for example, agencies are required to "make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof."[82] Similarly, for rules covered under UMRA, the requirement is as follows: "In promulgating a general notice of proposed rulemaking or a final rule for which a statement under subsection (a) [an impact analysis] is required, the agency shall include in the promulgation a summary of the information contained in the statement."[83]

Final Rules: Retrospective Review Requirements

Under the RAA, agencies would be required to publish along with final major or high-impact rules a plan for retrospective review of the rules. The review must take place "no less than every ten years" and must determine whether the rule is still necessary, whether the rule is achieving its objectives, whether the benefits still justify the costs, and whether the rule should be modified or rescinded.

For rules that are covered under the RFA (rules that have a "significant economic impact on a substantial number of small entities"), agencies must publish plans for similar retrospective reviews to ensure that the rule is still necessary, how the rule interacts with other existing rules, what changes may be necessary to the rule, and other similar elements.

Although no similar requirement exists in executive orders for the agencies to include a retrospective review plan with each individual rule they publish, Executive Orders 12866, 13563, and 13579 all implemented a general requirement for the government-wide retrospective review of rules. The spirit of those retrospective reviews appears to be similar to that in the RAA: to ensure that the rules currently in place are necessary and that the benefits still justify the costs of those rules.

[81] 5 U.S.C. §553(c).

[82] 5 U.S.C. §604(b).

[83] 2 U.S.C. §202(b).

(g) Exceptions from Notice and Hearing Requirements

This section discusses two exceptions to the APA's notice and comment procedures that the RAA would modify: (1) interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice; and (2) good cause.

The APA provides exceptions to the notice-and-comment rulemaking procedures for "interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice."[84] The RAA would still require such rules to adhere to its requirements for rulemaking considerations, but would exempt such rules from its ANPRM requirements, NPRM requirements, and high-impact rule hearing requirements, unless notice or hearing was required by statute. The RAA would also exempt such rules from its requirements for final rules, such as consultation with the OIRA Administrator; adoption of the rule on the basis of the best reasonably obtainable scientific, technical, economic, or other evidence and information; adoption of the least costly rule; and the requirements for the notice of final rulemaking. However, the RAA would retain its requirement that "interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice" include "a concise, general statement of the rule's basis and purpose."[85]

Additionally, the APA contains a good cause exception that allows an agency to issue a rule without notice and comment.[86] To issue a rule without notice and comment under the APA, the agency must "for good cause find[] (and incorporate the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[87] Each of these three terms or phrases has a specific meaning.[88] Whether the agency's use of the good cause exception is proper is a fact-specific inquiry, and courts have traditionally held that this exception will be "narrowly construed and reluctantly countenanced."[89] A common use of the good cause exception is in the issuance of interim or interim final rules, which are considered final rules with the force and effect of law.[90] Such rules are used by agencies to promulgate rules under the APA without providing the public with notice and an opportunity to comment before publication of the final rule, while reserving the right to modify the rule through a post-promulgation comment period.

The RAA also includes a modified good cause exception for *interim* rules. The RAA's good cause exception applies to its requirements for ANPRMs for major rules, high-impact rules, and rules involving novel legal or policy issues; for NPRMs; hearings for high-impact rules; and for final determinations on issues such as the rule's benefits "meet the relevant statutory objectives and justify the rule's costs" in the publication of the final rule. Like the APA's good cause exception, the RAA's good cause exception would apply if the agency finds that compliance "is impracticable or contrary to the public interest." The RAA creates a new procedure for the

[84] 5 U.S.C. §553(b)(A).

[85] The subsection that would become 5 U.S.C. §553(g)(1)(C) if the RAA is enacted would exclude the requirements of "subparagraphs (B) through (H) of subsection (f)(4)." Presently, the RAA does not include a subparagraph (H) in subsection (f)(4).

[86] 5 U.S.C. §553(b)(B).

[87] *Id.*

[88] Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 200 (1946).

[89] American Fed. of Gov't Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981)(quoting New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

[90] *See* Career College Ass'n v. Riley, 74 F.3d 1265, 1268 (D.C. Cir. 1996)("The key word in the title 'Interim Final Rule,' unless the title is to be read as an oxymoron, is not interim, but *final*. 'Interim' refers only to the Rule's intended duration—not its tentative nature.").

"unnecessary" exception, discussed below, and adds an exception for "interests of national security." As is true with an agency's use of good cause for interim rules under the APA, judicial review of an agency's use of the good cause exception would be available immediately upon "the agency's publication of an interim rule." The RAA provides that the record for the court to consider "shall include all documents and information considered by the agency and any additional information presented by a party that the court determines necessary to consider to assure justice."

The RAA would add a new requirement to address agencies' use of interim final rules. Under the RAA, "immediately upon publication of the interim rule," agencies would need to comply with the RAA's requirements for NPRMs, hearings for high-impact rules, and for final determinations in the publication of the final rule. The RAA indicates that the interim rule may be treated as an NPRM, and that the agency "shall not be required to issue supplemental notice other than to complete full compliance with" the RAA's NPRM requirements. If the agency does not complete such steps and either adopt a final rule or rescind the interim rule within 270 days of publication of the interim rule, or 18 months if the interim rule was a major or high-impact rule, then "the interim rule will cease to have the effect of law." Under the APA, the rescission of a rule, even an interim final rule, also requires a rulemaking,[91] so agencies may choose to allow the time clock to run out (and let the interim rule cease to have effect), rather than conduct a rulemaking and incur the associated costs in order to rescind the interim rule.

Like the APA, the RAA provides for the use of the good cause exception if the agency finds that notice and comment are "unnecessary,"[92] but the RAA would codify examples of a good cause finding that notice and comment are "unnecessary"—a rulemaking "undertaken only to correct a de minimis technical or clerical error in a previously issued rule or for other noncontroversial purposes." The RAA would codify a modified version of "direct final" rulemaking, a process that agencies use to quickly and efficiently finalize rules that the agency views as "routine or noncontroversial."[93]

Under direct final rulemaking, the agency publishes a proposed rule in the *Federal Register*, with language providing that the rule will become effective as a final rule on a specific date unless adverse comment is received by the agency.[94] If even a single adverse comment is received, as recently occurred with a Coast Guard rule,[95] the proposed rule is withdrawn and the agency may issue its proposed rule under the APA's notice-and-comment requirements.[96] The RAA would enable agencies to publish a final rule upon a good cause finding that notice and comment is unnecessary, but would require the agency to receive "significant adverse comment within 60 days after publication of the rule." While the RAA does not define "significant adverse comment," if such comment(s) are received, the agency's final rule would be treated as an NPRM and the rule would be subject to the bill's NPRM, high-impact rule hearing, and final rule determination requirements.

---

[91] 5 U.S.C. §551(5)("'Rulemaking' means the agency process for formulating, amending, or repealing a rule.").

[92] Such a finding of good cause would exempt the rule from the RAA's requirements for ANPRMs for major rules, high-impact rules, and rules involving novel legal or policy issues; for NPRMs; hearings for high-impact rules; and for final determinations on issues such as the rule's benefits "meet the relevant statutory objectives and justify the rule's costs" in the publication of the final rule. The RAA would retain the requirement that publication of a final rule would include "a concise, general statement of the rule's basis and purpose."

[93] LUBBERS, *supra* note 52, at 115.

[94] Administrative Conference of the United States Recommendation 95-4, http://www.law.fsu.edu/library/admin/acus/305954.html.

[95] Paul Singer, Roll Call, Single Voice Sinks Coast Guard's Rule (Sept. 22, 2011).

[96] *Id.*

(h) Additional Requirements for Hearings

Under the RAA, if a high-impact rule hearing is required, or if such a hearing is "otherwise required by statute or at the agency's discretion before adoption of a rule," the agency must follow formal rulemaking requirements in 5 U.S.C. Sections 556 and 557 and comply with the requirements for promulgating final rules. As previously mentioned, there are no comparable requirements in the APA or executive orders for such rules.

(i) Date of Publication of Rule

The RAA retains the APA's requirement that a final rule be published a minimum of 30 days before its effective date, which "afford[s] persons affected a reasonable time to prepare for the effective date of the rule."[97] The RAA also maintains the APA's exceptions that allow an agency to dispense with the 30-day delayed effective date requirement for "substantive rule[s] which grant or recognizes an exemption or relieves a restriction," "interpretative rules and statements of policy," and rules for which the agency finds good cause to dispense with the 30-day waiting period.

(j) Right to Petition

The RAA would keep the APA's provision that allows for interested persons to "petition for the issuance, amendment, or repeal of a rule."[98]

(k) Rule Making Guidelines

The RAA enacts into law authority for OIRA to issue guidance on how to assess costs and benefits. In addition, according to the RAA, "the rigor of cost-benefit analysis required by such guidelines shall be commensurate, in the Administrator's determination, with the economic impact of the rule." Under E.O. 12866, agencies are required to assess costs and benefits for "significant" rules, and they are required to perform a complete cost-benefit analysis for "economically significant" rules. From one point of view, the RAA's provision could be considered to be somewhat consistent with current practice. However, it appears that OIRA could use substantial discretion in how it defines and applies the term "rigor." It is not clear how OIRA would use that authority, but it is conceivable that OIRA could establish standards for rigor that would constitute changes from past practice.

The document that OMB previously has issued to provide guidance to agencies on how to perform cost-benefit analyses is OMB Circular A-4.[99] In essence, the circular provides "best practices" for agencies on how they should prepare their economic analyses of rules. The RAA would enact into law OIRA's authority to issue these guidelines and would also require the OIRA Administrator to regularly update the guidelines. Agencies would be required under the RAA to comply with OIRA's guidelines. Both OIRA's guidelines and the OIRA Administrator's determination as to whether an agency complied with its guidelines would be "entitled to judicial deference."

[97] Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 201 (1946).

[98] 5 U.S.C. §553(e).

[99] OMB Circular A-4 can be found on the White House's website at http://www.whitehouse.gov/omb/circulars_a004_a-4/.

In addition, OIRA would be required to issue a number of other guidelines for other topics, including on the coordination, simplification, and harmonization of rules, so as to avoid the duplication of or inconsistencies with other agencies' regulations. OIRA would also be required to issue guidelines to agencies as to how to conduct rulemakings under the RAA's procedures if the agency's rulemaking is conducted under procedures other than normal APA procedures. This would appear to affect hybrid rulemaking statutes, which typically place additional procedural requirements on agencies that may be found in the adjudicative context, but fall short of mandating that an agency engage in the APA's formal rulemaking process.[100] This provision would appear to affect many other statutes as well, as it requires that OIRA's guidelines ensure that rulemakings affected by other statutory requirements "conform to the fullest extent allowed by law with" the RAA's notice and comment procedures.

Under the RAA, OIRA would be required to issue guidelines for the conduct of IQA hearings and high-impact rule hearings, and agencies also must adopt rules for the conduct of these hearings, consistent with the OIRA guidelines. Additionally, OIRA must issue guidelines pursuant to the IQA to apply in both informal and formal rulemakings.

(l) Inclusion in the Record of Certain Documents and Information

Section 553(l) of the RAA stipulates that the agency shall provide all the information it used in its rulemaking proceedings in the rulemaking docket. As noted earlier in a similar provision, the proposed legislation also would give to OIRA and the President substantial discretion over what materials were included in the docket from their communications with the agency during the rulemaking proceedings.

(m) Monetary Policy Exemption

The RAA would provide an exception from certain cost-benefit requirements for rules "that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee." While the APA does exempt certain rules from its informal rulemaking requirements, such as rules involving "military or foreign affairs function[s] of the United States" or rules "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts," the APA does not contain an exemption for rules concerning monetary policy.

The RAA would exempt such rules from the following requirements: (1) Rulemaking considerations of the "potential costs and benefits associated with potential alternative rules;" "means to increase the cost-effectiveness of any Federal response;" and "incentives for innovation, consistency, predictability, lower costs of enforcement and compliance …, and flexibility." (2) "A reasoned preliminary determination that the benefits of the proposed rule meet the statutory objectives and justify the costs of the proposed rule," and "a discussion of" "alternatives to the proposed rule," "costs and benefits of those alternatives," "whether those alternatives meet relevant statutory objectives," and "why the agency did not propose any of those alternatives." (3) Hearings for high-impact rules. (4) Requirements that the agency adopt the least costly rule considered during the rulemaking or that the agency may adopt a more costly rule "only if the additional benefits of the most costly rule justify its additional costs and only if the agency explains its reason for doing so based on interests of public health, safety, or welfare that are clearly within the scope of the statutory provision authorizing the rule."

[100] *See, e.g.*, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §57a.

The RAA also states that it would exempt monetary policy rules from "subparagraphs (C) and (D) of subsection (f)(5)," however, there is no subsection (f)(5) in the RAA. It appears, based on the other exemptions from discussions of costs and the least costly alternative, that the RAA may have intended to exempt such rules from subparagraphs (C) and (D) of subsection (f)(4), which require "the agency's reasoned final determination that the benefits of the rule meet the relevant statutory objectives and justify the rule's costs," and "the agency's reasoned final determination not to adopt any of the alternatives to the proposed rule" including a determination "that no alternative considered achieved the relevant statutory objectives with lower costs" or a determination that the agency's "adoption of a more costly rule" complies with other RAA requirements for such adoption.

Agency Guidance; Procedures to Issue Major Guidance; Presidential Authority to Issue Guidelines for Issuance of Guidance (Section 4 of the RAA)

The RAA would explicitly incorporate guidance documents into the APA and also create specific statutory requirements that "major guidance" and guidance "involving a novel legal or policy issue arising out of statutory mandates" would be required to follow prior to issuance, including the identification of costs and benefits and a consultation with the OIRA Administrator. The following sections discuss the requirements in Section 4 of the RAA.

Procedures to Issue

Presently, agency documents that are merely general statements of policy, such as guidance documents, are not required to undergo APA notice-and-comment procedures. Current APA notice-and-comment requirements do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[101] These types of agency action, while technically defined as rules, are generally referred to as nonlegislative rules, as they do not have the force and effect of law.[102]

However, OMB's Final Bulletin on Agency Good Guidance Practices provides for notice and comment of an "economically significant guidance document,"[103] as well as additional procedures for "significant guidance documents," which include agency approval of their issuance, a prohibition on the use of mandatory language unless describing statutory or regulatory requirements or addressing agency staff, and procedures for public access and comment in the OMB Bulletin. See the "Definitions (Section 2 of the RAA)" section above for a discussion of the

[101] 5 U.S.C. §553(b)(3)(A); *see, e.g.*, Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1534 (D.C. Cir. 1989).

[102] William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001)("These rules are often called nonlegislative rules, because they are not 'law' in the way that statutes and substantive rules that have gone through notice and comment are 'law,' in the sense of creating legal obligations on private parties.").

[103] The Bulletin defines as a "significant guidance document that may reasonably be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy, except that economically significant guidance documents do not include guidance documents on Federal expenditures and receipts." Memorandum from Rob Portman, to the Heads of Executive Departments and Agencies, on Issuance of OMB's Final Bulletin for Agency Good Guidance Practices (Jan. 18, 2007), http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf.

differences between "significant" and "economically significant" guidance documents under the OMB Bulletin and the RAA's definition of "major" guidance.

The RAA would require major guidance and guidance "that involves a novel legal or policy issue arising out of statutory mandates" to undergo new procedures before the agency could issue such documents. The agency would be required to "make and document a reasoned determination that—(A) assures that such guidance is understandable and complies with relevant statutory objectives and regulatory provisions (including any statutory deadlines for agency action); (B) summarizes the evidence and data on which the agency will base the guidance"; (C) identify costs and benefits, including costs that would be considered under a rulemaking "of conduct conforming to such guidance and assure[] that such benefits justify such costs"; and (D) describe alternatives to the guidance and the costs and benefits of such alternatives and "why the agency rejected those alternatives." The agency must publish the documentation required for these four requirements "by electronic means and otherwise."

Presently, OMB's Bulletin discusses consultations with the OIRA Administrator in the context of exempting significant guidance documents from the Bulletin's requirements and addressing public comments on economically significant guidance documents.[104] The RAA would include a consultation requirement with the OIRA Administrator "on the issuance of such guidance" to assure that the guidance is "reasonable, understandable, consistent with relevant statutory and regulatory provisions and requirements or practices of other agencies," and the RAA also separately provides such goals for guidance documents. Additionally, the RAA would create a new requirement related to costs and benefits—that agencies confer with the OIRA Administrator to assure that the guidance "does not produce costs that are unjustified by the guidance's benefits, and is otherwise appropriate."

Binding Nature

The RAA also states legal concepts regarding guidance that appear in case law and most agency guidance documents, such as the fact that agency guidance documents are not legally binding. Currently, if a general statement of policy is implemented in a manner that is binding on the agency and/or outside parties, a reviewing court would likely regard it as a legislative rule that should be deemed invalid for failing to comply with APA notice-and-comment procedures.[105] The question of whether a general statement of policy or a nonlegislative rule is in fact a legislative rule required to be issued under APA notice-and-comment procedures is a fact-specific one that courts will examine on a case-by-case basis.

Presidential Authority to Establish Guidelines for Agency Issuance of Guidance

While there is no specific authority in existing executive orders for OIRA to issue guidelines on guidance documents, E.O. 12866 recognized OIRA as "the repository of expertise on regulatory issues." OMB has previously issued its Final Bulletin on Agency Good Guidance Practices, based on the now-revoked E.O. 13422, and that executive order discussed OMB's authority with regard

[104] *Id.* at 9, 15.

[105] Bellarno Int'l v. Food and Drug Administration, 678 F. Supp. 410 (E.D.N.Y. 1988). Some agencies have been criticized for using guidance documents to "issue or amend [their] real rules, i.e., [their] interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (quoting Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995)).

to guidance documents. Additionally, specific statutory provisions, such as the IQA, have directed OMB to issue guidance.

The RAA would grant the OIRA Administrator the authority to issue guidelines on agencies' issuance of major and other guidance documents, and the bill prescribes several requirements for these guidelines. The RAA would require the guidelines to "assure that each agency avoids issuing guidance documents that are inconsistent or incompatible with, or duplicative of, the law, its other regulations, or the regulations of other Federal agencies." This requirement for the guidelines are similar to the RAA's directive that agencies shall avoid the issuance of such guidance, discussed above, although the directive to the OIRA Administrator indicates agencies must avoid issuing guidance that is "inconsistent or incompatible with, or duplicative of" other agencies' rules. Such guidelines also must assure that an agency "drafts its guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from uncertainty." This RAA requirement for *guidance* is nearly identical to E.O. 12866's Section 1(b)(12) "Principles of Regulation," which states that "Each agency shall draft its *regulations* to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."

Hearings; Presiding Employees; Powers and Duties; Burden of Proof; Evidence; Record as Basis of Decision (Section 5 of the RAA)

If enacted, the RAA would institute various changes in the hearing process to allow for greater public access to transcripts and requests filed in a hearing proceeding, to incorporate information that is part of the rulemaking proceedings into the record for IQA hearings and high-impact rule hearings, and exempt rules on monetary policy from the bill's provision on petitions for hearings for rules. The following sections discuss the requirements in Section 5 of the RAA.

5 U.S.C. Section 556(e)

The APA's current 5 U.S.C. Section 556(e), which discusses transcripts of testimony and exhibits, makes such transcripts and requests filed in a proceeding available to the parties, "on payment of lawfully prescribed costs." The RAA would modify this subsection to make transcripts and requests available, electronically, to the parties and the public. Transcripts and requests would still be made available in other than electronic form "upon payment of lawfully prescribed costs."

Hearings

Under the RAA, if the agency conducts a either an IQA hearing or a hearing on a high-impact rule, the record for decision "shall also include any information that is part of the record of proceedings under" 5 U.S.C. Section 553, which includes both of these hearings as well as the RAA's expanded rulemaking requirements.

Under the RAA, if the agency conducts a rulemaking under 5 U.S.C. Sections 556 and 557 (a formal rulemaking) "directly after concluding proceedings upon" an ANPRM under the RAA's requirements for ANPRMs,[106] then the "matters to be considered and determinations to be made

[106] Such ANPRM requirements under the RAA would apply to major rules, high-impact rules, and rules involving novel legal or policy issues.

shall include … the matters and determinations" in the RAA's additions with regard to rulemaking considerations and final rule determinations. Generally speaking, these considerations and determinations concern costs and benefits.

Grants or Denials of Petitions for Hearings/Rules on Monetary Policy

If a person petitioned for a hearing regarding a major rule, under the RAA's amendments to 5 U.S.C. Section 556, the agency would be required to grant the petition "unless the agency reasonably determines that a hearing would not advance consideration of the rule or would, in light of the need for agency action, unreasonably delay completion of the rulemaking." The agency's decision, with regard to granting or denying the petition must be published under the RAA, along with "an explanation of the grounds for decision." The RAA would require the information in the petition to be included in the administrative record.

As indicated earlier, while the APA exempts certain rules, such as military and foreign affairs rules, from its requirements, the APA does not contain an exemption for rules concerning monetary policy. The RAA would provide an exception from its provision on petitions for hearings for rules "that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee."

Actions Reviewable (Section 6 of the RAA)

As a general matter, there is a "strong presumption that Congress intends judicial review of administrative action."[107] The APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[108] As mentioned above, with regard to judicial review under the IQA, the IQA's statutory language does not explicitly provide for judicial review and courts have examined the issue in cases brought under the IQA or APA.[109] H.R. 3010 and S. 1606 differ significantly in their modifications to the APA's provision on judicial review of agency actions.

H.R. 3010 would keep the current APA provision on actions reviewable under the APA's judicial review provisions, and add a new provision on what constitutes a "final agency action" with regard to the IQA. H.R. 3010 would provide that the following agency actions are "final agency actions" subject to judicial review: (1) denials of correction requests, (2) denials of appeals under an administrative mechanism that each agency is required to establish pursuant to the IQA, and

[107] Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 424 (1995)(quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986)).

[108] 5 U.S.C. §704. The APA provides two exceptions to the presumption of availability of judicial review of agency action: (1) "to the extent that … statutes preclude judicial review" and (2) "where agency action is committed to agency discretion by law." 5 U.S.C. §701. However, judicial review of an unreviewable determination may occur if there is a constitutional issue. *See* Webster v. Doe, 486 U.S. 592 (1988); Oestereich v. Selective Service System, 393 U.S. 233 (1968).

[109] Habitat for Horses v. Salazar, 2011 U.S. Dist. LEXIS 107267, *21-*22 (S.D.N.Y. 2011); *In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1174-75 (D. Minn. 2004), *aff'd in part and vacated in part on other grounds*, 421 F.3d 618 (8th Cir. 2005); *see also* OMB, OIRA, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 85 (2011), http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

(3) an agency's failure to grant or deny a request or appeal within 90 days. S. 1606 does not contain this provision on what constitutes a "final agency action" with regard to the IQA.

H.R. 3010 and S. 1606 also would provide for immediate judicial review of interim rules published by the agency "without compliance with" H.R. 3010's requirements for ANPRMs, NPRMs, hearings for high-impact rules, or requirements to render final determinations in the agency's final rule. H.R. 3010 and S. 1606's provision of judicial review essentially allows a person with standing to challenge the agency's finding of good cause (that compliance with such procedures is "impracticable or contrary to the public interest") for "abuse of discretion," which is one of the APA's scope of review provisions.[110] H.R. 3010 and S. 1606 codify judicial review of such agency good cause determinations in both the "(g) Exceptions from Notice and Hearing Requirements" discussed above, and in the APA's judicial review provisions. Under H.R. 3010 and S. 1606, agency determinations of good cause made in the issuance of an interim rule that are based on "interests of national security" are not judicially reviewable.

S. 1606 would prohibit judicial review of compliance with certain sections of S. 1606 for rules other than major or high impact rules under what would be the new 5 U.S.C. Section 706(a)(2)(A). This provision addresses the scope of review under which a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." S. 1606 would prohibit judicial review for rules other than major and high-impact rules for compliance with provisions on rulemaking considerations of the potential costs and benefits associated with potential alternative rules, "the means to increase the cost-effectiveness of any Federal response," and "incentives for innovation, consistency, predictability, lower costs of enforcement and compliance (to government entities, regulated entities, and the public), and flexibility." S. 1606 also would prohibit judicial review for rules other than major and high-impact rules for compliance with provisions that a "reasoned preliminary determination that the benefits of the proposed rule meet the relevant statutory objectives and justify the costs of the proposed rule" and "a discussion of the alternatives to the proposed rule," "the costs and benefits of those alternatives," "whether those alternatives meet relevant statutory objectives," and "why the agency did not propose any of those alternatives," should be included in an NPRM. Additionally, S. 1606 would prohibit judicial review for rules other than major or high-impact rules of an agency's adoption of the least costly rule and the agency's reasoned final determinations, including that the rule's benefits "meet the relevant statutory objectives and justify the rule's costs," and that "no alternative considered achieved the relevant statutory objectives with lower costs."

However, S. 1606 explicitly provides for judicial review of determinations of whether a rule is a not a high-impact rule or a major rule "within the meaning of 551(19)(A)," which is a rule that the OIRA Administrator "determines is likely to impose—(A) an annual cost on the economy of $100,000,000 or more, adjusted annually for inflation."

[110] 5 U.S.C. §706(2)(A).

Scope of Review (Section 7 of the RAA)

Scope of Review

The APA provides standards of judicial review of agency action that a court will use to evaluate whether an agency's action is valid.[111] The RAA would modify the APA's provision that states: "The reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,"[112] by adding "(including the Information Quality Act)." As the RAA also would add a new provision stating that agency denials of information correction requests, denials of administrative appeals, and agency failures to grant of deny a request or appeal under the IQA are "final agency actions," the RAA would appear to provide for judicial review of the agency's actions under the APA. Courts grant varying levels of deference to agency interpretations of statutes when examining questions such as whether an agency's action is in excess of its delegated statutory authority.[113]

Deference to Agency Interpretations of Agency Rules and Determinations

The RAA would add a new requirement to the APA's scope of review provision that would prohibit judicial deference to several agency interpretations and determinations. Judicial deference is the degree to which a court will uphold and respect the validity of an agency's interpretation of a statutory or regulatory provision during judicial review of the agency's decisions. Courts grant varying levels of deference to agency interpretations. The RAA's potential impacts on case law and the types of judicial deference to agency actions are discussed below.

Additionally, the RAA would provide that agency denials of petitions for extending the issues in a high-impact rule hearing to "other issues relevant to the rulemaking" and any other petition for a hearing under the APA formal rulemaking provisions (5 U.S.C. §§556 and 557) for abuse of discretion.

First, the RAA would prohibit judicial deference to an agency's interpretation of its rule "if the agency did not comply with" informal or formal rulemaking procedures "to issue the interpretation." Judicial deference to agency interpretations of the agency's own rule is addressed in case law.[114] Under one type of judicial deference to agency action, known as *Auer* deference: "An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation."[115] Under *Auer* deference, the Court will "accept the agency's position unless it is 'plainly erroneous or inconsistent with the regulation.'"[116] However, in what has been

[111] LUBBERS, *supra* note 52, at 469. The APA provides several types of judicial review that apply unless otherwise specified by statute. *Id.*

[112] 5 U.S.C. §706(2)(A).

[113] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27(2001); LUBBERS, *supra* note 52, at 490-91.

[114] *See, e.g.*, Auer v. Robbins, 519 U.S. 452 (1997); Talk America, Inc. v. Michigan Bell Telephone Co., 564 U.S. __ (2011), 131 S. Ct. 2254 (2011); Pliva, Inc. v. Mensing, 564 U.S. __ (2011), 131 S. Ct. 2567 (2011)(deferring to FDA's interpretation of its regulations on drug labeling).

[115] Gonzales v. Oregon, 546 U.S. 243, 255 (2006)(citing Auer v. Robbins, 519 U.S. at 461-63).

[116] Federal Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008) (quoting *Auer*, 519 U.S. at 461).

termed the "anti-parroting" cannon of *Gonzales v. Oregon*, the Court found "that *Auer* deference is inapplicable where an agency seeks deference for its interpretation of a regulation that merely parrots the statute."[117] The RAA's prohibition on judicial deference to agency interpretations of agency rules unless the agency used informal or formal rulemaking procedures would appear to eliminate *Auer* deference for other agency interpretations.[118] To receive deference under the RAA, agency interpretations of their own rules also would appear to be required to be issued as rules.

Second, under the RAA, courts could not defer to agency cost-benefit determinations or "other economic or risk assessment of the action, if the agency failed to conform to" OIRA-established guidelines. The RAA's prohibition on judicial deference to such determinations due to procedural noncompliance could potentially result in a court performing its own cost-benefit determinations and risk assessments, if a reviewing court found an agency had not complied with OIRA guidance.

Third, courts could not defer to agency "determinations made in the adoption of an interim rule." This provision could potentially conflict with the RAA's proposed amendment to the APA's provision on reviewable agency actions, which would provide that "immediate judicial review … of the agency's determination to adopt such rule on an interim basis … shall be limited to whether the agency abused its discretion to adopt the interim rule without compliance with section 553(c), (d), or (e) or without rendering final determinations under subsection (f) of section 553."

Finally, under the RAA, courts could not defer to agency guidance. Judicial deference to agency guidance documents is also addressed in case law, and the RAA's prohibition on deference to agency guidance would appear to eliminate even weak *Skidmore* deference to agency guidance (discussed below). As a result, courts would interpret statutes without the ability to account for an agency's specialized experience in administering a statute or regulation.

The 2001 case *United States v. Mead Corporation* focused on a tariff classification ruling by the Customs Service and held that the ruling "fail[ed] to qualify" for *Chevron* deference.[119] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* is the leading case on judicial review of agency interpretations of statutes.[120] In *Chevron*, the Court enunciated a two-step test for judicial review of an agency's interpretation of its own statute: (1) Has Congress "directly spoken to the precise question at issue?" and (2) if Congress has not done so and "the statute is silent or ambiguous with respect to the specific issue," is the agency's answer "based on a permissible construction of the statute?"[121] Under *Chevron* step one, if Congress has spoken directly to the

---

[117] Kathryn Watts, *Judicial Review*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2007-2008, at 88 (Jeffrey S. Lubbers, ed., 2009)(quoting *Gonzales*, 546 U.S. at 257, as stating that the "near-equivalence of the statute and regulation belies *Auer* deference"); *see also* Kentucky Retirement Systems v. Equal Employment Opportunity Commission, 554 U.S. 135 (2008); 128 S. Ct. 2361, 2370 (2008).

[118] Talk America, Inc. v. Michigan Bell Telephone Co., 564 U.S. __ (2011), 131 S. Ct. 2254 (2011)("As we reaffirmed earlier this Term, we defer to an agency's interpretation of its regulations, *even in a legal brief*, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[s]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'")(internal quotation marks omitted)(emphasis added).

[119] 533 U.S. 218, 226-27 (2001). *Chevron* involved the Environmental Protection Agency's rules defining "stationary source" for purposes of nationwide regulation of emissions under the Clean Air Act.

[120] 467 U.S. 837 (1984). For a fuller discussion of *Chevron*, see CRS Report R41260, *The Jurisprudence of Justice John Paul Stevens: The Chevron Doctrine*, by Todd Garvey.

[121] *Chevron*, 467 U.S. at 842-43. The *Chevron* Court also discussed express and implied congressional delegations of legislative authority to agencies: "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.... Sometimes the

question at issue, then *Chevron* deference is not due and the Court "must give effect to the unambiguously expressed intent of Congress."[122] If Congress's intent is unclear or if Congress is silent, the Court's role at *Chevron* step two is to defer to any reasonable agency interpretation of the pertinent statutory language.[123]

The *Mead* Court qualified its decision in *Chevron* by holding that *Chevron* deference to an agency's interpretation of an ambiguous statute was "warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation was promulgated in exercise of that authority.'"[124] These threshold determinations of whether Congress delegated authority and whether the agency has exercised its authority to act with the force of law, such as in notice-and-comment rulemaking or formal adjudication, has been referred to as *Chevron* step zero.[125] The *Mead* Court held that congressional delegation of authority to an agency to make rules with the force of law "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[126] As the Court had explained earlier in *Christensen v. Harris County*,[127] policy statements, agency manuals, enforcement guidelines, and interpretive opinion letters do not warrant *Chevron*-level deference.[128]

In the 2002 case *Barnhart v. Walton*, the Court focused on the longstanding nature of the agency's interpretation and found that *Chevron* deference may apply to agency interpretations reached "through means less formal than 'notice-and-comment' rulemaking."[129] The *Barnhart* Court pointed to factors that highlighted "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[130]

With regard to the level of judicial deference that should be accorded to informal procedures, courts appear to be required to make a "threshold determination: whether to apply the criteria for determining *Chevron* worthiness from *Mead* or those from *Barnhart* ... Thus, *Chevron* deference appears to depend on whether the court evaluating a particular interpretive procedure favors *Mead*-style factors or *Barnhart*-style factors."[131] If the agency's interpretation does not qualify for

---

legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 843-44.

[122] *Id.* at 843.

[123] *Id.* at 843.

[124] Gonzales v. Oregon, 546 U.S. 243, 255-56 (2005)(quoting United States v. Mead Corp., 533 U.S. 218, 226-27 (2001))(internal citations omitted).

[125] Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191, 207 (2006). *But see Mead*, 533 U.S. at 231 ("[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

[126] *Mead*, 533 U.S. at 226-27.

[127] 529 U.S. 576 (2000).

[128] *Id*. at 587.

[129] 525 U.S. 212, 221-22 (2002).

[130] *Id.* at 222.

[131] Richard Murphy, et al., *Judicial Review*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2004-2005, at 99 (Jeffrey S. Lubbers, ed., 2006).

Chevron deference, it is otherwise "'entitled to respect' only to the extent it has the 'power to persuade'" under the standard of deference set forth in *Skidmore v. Swift & Co*.[132]

If *Chevron* deference does not apply to the agency's interpretation—such as in cases when the agency interprets a statute that also applies to other agencies or when the agency has issued an opinion letter—"courts ordinarily will give some deference or weight to an agency's interpretation of a statute that it administers."[133] Under *Skidmore v. Swift & Co*., a court may defer to such agency interpretations, as they are entitled to a "respect proportional to [their] 'power to persuade.'"[134] The *Skidmore* Court stated that "[t]he weight [granted an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[135] In other words, courts will often give weight to an agency's interpretations, due to the agency's "specialized experience" in the administration of its given functions.[136]

Added Definition (Section 8 of the RAA)

The APA currently contains no definition for "substantial evidence." The Supreme Court has "defined substantial evidence as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[137] The RAA would use similar language in its definition of "substantial evidence," which, under the RAA, would mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever in the record fairly detracts from the weight of the evidence relied upon by the agency to support its decision."

The RAA would add its definition of "substantial evidence" in chapter 7 of Title 5, United States Code, which delineates APA standards for judicial review. The RAA's definition would impact 5 U.S.C. Section 706, Scope of review, which states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—…
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (E) unsupported by substantial evidence in a case subject to [5 U.S.C. §§556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; …
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The RAA's definition of substantial evidence would be used to evaluate adjudications and formal rulemakings conducted under 5 U.S.C. Sections 556 and 557. Under one reading of the RAA's

---

[132] Gonzales v. Oregon, 546 U.S. 243, 255-56 (2005)(internal citations omitted).

[133] LUBBERS, *supra* note 52 at 507 (quoting AMERICAN BAR ASSOCIATION, SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 31 (2004)); Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[134] *Mead*, 533 U.S. at 235 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[135] *Skidmore*, 323 U.S. at 140.

[136] United States v. Mead Corp., 533 U.S. 218, 234 (2001)(quoting *Skidmore*, 323 U.S. at 140).

[137] Am. Textile Mfrs. Institute v. Donovan, 452 U.S. 490, 522 (1981).

amendments, a court also may review a high-impact rule hearing if such hearing is considered to be "an agency hearing provided by statute."[138]

Effective Date (Section 9 of the RAA)

The RAA would restrict its application to pending or completed rulemakings. The following RAA amendments would not apply to pending or completed rulemakings on the date of the RAA's enactment: the RAA's amendments to the informal and formal rulemaking sections of the APA; the RAA's definition of "substantial evidence"; the RAA's new provisions that a court shall not defer to an agency's cost/benefit determinations and economic and risk assessments if the agency failed to conform to OIRA-established guidelines and that a court shall not defer to agency determinations made in the adoption of an interim rule; the RAA's addition of court reviews (for abuse of discretion) of agency denials of petitions during high-impact rule hearings "by an interested person who has participated in the rulemaking" related to "other issues relevant to the rulemaking," due to an agency "determin[ation] that consideration of the issues at the hearing would not advance consideration of the rule or would, in light of the nature of the need for agency action, unreasonably delay completion of the rulemaking"; and the RAA's addition of court reviews (for abuse of discretion) of agency denials of petitions for hearings under the APA's formal rulemaking provisions, 5 U.S.C. Sections 556 and 557.

Potential Issues for Congress

This section first provides a list of the most significant changes to the APA that the RAA would make. This section then discusses some potential broad implications of the RAA's changes to the rulemaking process.

Significant Changes by the RAA

If enacted, the RAA would enact major changes to the current rulemaking process. Some of the most significant changes are listed here. The H.R. 3010 version of the RAA would:

- Require agencies to adopt the "least costly" rule that meets "relevant statutory objectives" unless the benefits justify additional costs.
- Provide for judicial review of certain requirements and determinations, for which judicial review is not presently available or for whether there is a question as to whether judicial review is available.
- Overhaul the current notice-and-comment (informal) rulemaking process by codifying and modifying existing requirements and instituting many procedural and substantive additions to informal rulemaking.
- Raise questions regarding how the RAA would interact with existing statutory requirements for cost-benefit analysis and statutory prohibitions on cost considerations.

[138] *See* ABA Comments, *supra* note 35, at 35 ("The first prong of this trigger [the language indicating a 'case subject to' 5 U.S.C. §§ 556 and 557] may not apply because rulemakings that involved a formal hearing, i.e. were subject to [5 U.S.C. §§ 556 and 557], will *also* have been 'subject to' notice and comment under § 553. The second prong [or otherwise reviewed on the record of an agency hearing provided by statute] may not be satisfied because the bill expressly states that the record for review in a case of this nature would be the record of the formal hearing *plus* the ordinary §553 record.").

- Impose new requirements on independent regulatory agencies, including cost-benefit analyses and OIRA review.
- Impact existing case law on judicial deference to agency interpretations of rules and agency guidance.
- Provide that interim rules shall cease to have the effect of law if such rules are not finalized or rescinded in accordance with the RAA's requirements within 270 days of publication of the interim rule or 18 months if the rule is a major or high-impact rule.
- Mandate trial-like formal rulemaking procedures for high-impact rules.
- Require ANPRMs for major rules, high-impact rules, and rules involving novel legal or policy issues arising out of statutory mandates.
- Mandate the identification of costs and benefits, and assure that such benefits justify the cost, in major guidance documents and guidance that involves a novel legal or policy issue arising out of statutory mandates.
- Establish minimum time periods for comment in rulemakings.
- Grant the OIRA Administrator, in statute, increased powers and responsibilities.
- Enable IQA petitions under existing APA hearing requirements to determine if an agency's proposed rule does not comply with the IQA.

Potential Effects of Additional Rulemaking Requirements

The RAA would expand many requirements that already exist in the rulemaking process, and it would codify certain requirements that currently exist in executive orders and OMB documents. It would also add some requirements that do not currently exist.

Supporters of the RAA have said that the RAA would help standardize the rulemaking process by enacting into law the executive order requirements for OIRA review and cost-benefit analysis, as well as other requirements and guidance that have been added since the APA. Proponents of the bill have also express strong support for the expansion of OIRA review and cost-benefit analyses to more rules and to independent regulatory agencies, saying that agencies would be held more accountable by the existence of these requirements.

On the other hand, because of these new requirements, opponents of the bill have argued that the rulemaking process could become more difficult for agencies to navigate and more time may be required for agencies to issue rules. New requirements for hearings and minimum lengths for comment periods, for example, would likely extend the length of time it takes for agencies to promulgate rules. Furthermore, the extension of judicial review to considerations for which it does not presently exist could also potentially result in increased litigation.

Although many of the requirements for the RAA are similar to requirements that currently exist under the RFA and UMRA, some of the requirements are narrow in scope compared to the RAA's application of similar requirements. If enacted, the RAA would supplant sections (b) through (e) of 5 U.S.C. Section 553, the APA's informal rulemaking provision, but it would not replace the requirements in the RFA or UMRA. Therefore, agencies would have to conduct the analyses that are currently required of them, and they would have additional requirements to meet as well.

Additionally, enactment of the RAA could also lead to uncertainty for regulators and regulated entities as the courts interpret the RAA's provisions, particularly with regard to provisions that provide new authorities, definitions, and requirements.

RAA May Require Additional Time and Resources

Another related potential ramification that could arise from enactment of the RAA is that it could be more difficult for agencies to meet statutory deadlines due to the additional requirements and the addition of a minimum length of time for comment periods. In order for agencies and OIRA to fulfill these procedural requirements, additional resources may be necessary. For example, the RAA would require agencies to conduct many more cost-benefit analyses than are currently required, and OIRA would be required to review many more rules than it is currently required to review. There would also be a cost associated with the increased litigation that the RAA would be likely to bring about. The requirement for a potentially large subset of rules (major rules, high-impact rules, and rules involving novel legal or policy issues) to publish ANPRMs 90 days before publishing an NPRM and the minimum 60-day comment period associated with that requirement could also make rulemaking proceedings longer.

Implications for Independent Regulatory Agencies

Another potential implication of the enactment of the RAA may be a change in the level of independence of the independent regulatory agencies. Presidential executive orders on regulatory review have excluded independent regulatory agencies by referencing a statutory definition of an "independent regulatory agency" that contains a list of such agencies.[139] The majority of these independent regulatory agencies, including the Securities and Exchange Commission, the Federal Communications Commission, and the Board of Governors of the Federal Reserve System, are led by multi-member boards in which substantive regulatory authority is vested in the board itself.[140] The heads of independent regulatory agencies typically may be removed by the President only for cause.[141] For cause removal protection provides an element of insulation from presidential control.[142]

Independent regulatory agencies may also have several other structural elements that theoretically provide insulation from executive branch control, such as staggered terms of office for the members of a multi-member board,[143] as well as an odd number of members, with no more than a simple majority from one political party, who serve terms for an odd number of years and that may "extend beyond the four-year presidential term."[144]

Independent regulatory agencies have not been covered by the requirements for OIRA review and cost-benefit analysis since those requirements were established by President Ronald Reagan in

[139] 44 U.S.C. §3502.

[140] Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1236-94 (2000)(surveying the mission, membership, quorum and voting requirements, disqualification and recusal procedure, chairman's powers, Office of Management and Budget bypass provisions, and litigation authority of 32 independent agencies).

[141] *See, e.g.*, Breger and Edles, *supra* note 140, at 1138. The Board of Governors of the Federal Reserve and the Securities and Exchange Commissioners have for cause removal protections. 12 U.S.C. §242; *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988). Consumer Product Safety Commission members are protected from removal except for cases of "neglect of duty or malfeasance," 15 U.S.C. §2053(a), while Federal Trade Commission members are protected from removal except in cases of "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. §41.

[142] Brett M. Kavanaugh, *Symposium: Law & Politics in the 21st Century: Article: Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1471-72 (May 2009).

[143] *See, e.g.*, Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2087 n.80 (1990).

[144] Breger and Edles, *supra* note 140, at 1137.

E.O. 12291. President Clinton also chose to exclude those agencies when he issued E.O. 12866, which superseded E.O. 12291. According to President Clinton's OIRA Administrator, those agencies were excluded from the requirements for centralized regulatory review because presidential advisors concluded that the legal authority to extend the requirements existed, but the President should maintain deference to Congress and respect the independence of the agencies.[145]

As discussed throughout this report, if enacted, the RAA would extend both of the major requirements of E.O. 12866 to the independent regulatory agencies. First, they would have to submit their proposed and final rules to OIRA for review. Under the executive orders that have been in place since 1981, the requirements for OIRA consultation has essentially allowed the President, through OMB and OIRA, to ensure that regulations are consistent with his policy priorities. Therefore, critics may point out that a requirement for OIRA consultation could reduce the level of independence of those agencies. On the other hand, supporters of this change have argued that OIRA review would provide an important check on rulemaking in the independent regulatory agencies.

Second, the independent regulatory agencies would also be subject to the same requirements for cost-benefit analysis to which other agencies currently are subject under E.O. 12866. During FY2010, the independent regulatory agencies promulgated 17 "major" (defined differently than in the RAA)[146] rules, 16 of which "were issued to regulate the financial sector," and while some agencies assessed costs, according to GAO, "none of the 17 rules assessed both anticipated benefits and costs."[147] OMB has indicated that it "does not know whether the rigor of the analyses conducted by these agencies is similar to that of the analyses performed by agencies subject to OMB review."[148] OMB has "encouraged" independent regulatory agencies to follow E.O. 13563's instruction that agencies use "the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible," as well as the executive order's principles and requirements.[149]

Again, critics of this change may point to the independence of the independent regulatory agencies when it comes to OIRA's ability to examine their cost-benefit analyses. Critics of the RAA's change also may argue that courts may hold agencies accountable to their current statutory mandates with regard to cost-benefit analyses.[150] Supporters of that change would argue, however, that those agencies should be held to the same standard to which other agencies are held

---

[145] Testimony of Sally Katzen, U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Federal Regulation: A Review of Legislative Proposals, Part II*, 112th Cong., 1st sess., July 20, 2011.

[146] "For the purposes of this Report, we define major rules to include all final rules promulgated by an Executive Branch agency that meet any one of the following three conditions: Rules designated as "major" under 5 U.S.C. § 804(2); Rules designated as meeting the analysis threshold under the Unfunded Mandates Reform Act of 1995 (UMRA); or Rules designated as "economically significant" under section 3(f)(1) of Executive Order 12866." OMB, OIRA, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 8 (2011), http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

[147] *Id.* at 4.

[148] *Id.* at 31.

[149] *Id.* (citing Cass R. Sunstein, Administrator, OIRA, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, "Executive Order 13563, 'Improving Regulation and Regulatory Review,'" 6 (Feb. 2, 2011), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf).

[150] *See* Business Roundtable v. SEC, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011)(vacating the agency's rule and holding the SEC "acted arbitrarily and capriciously for having failed … adequately to assess the economic effects of a new rule," as the agency was statutorily required to do). According to the court, the SEC "failed adequately to quantify the certain costs or to explain why those costs could not be quantified." *Id.* at 1149.

when considering costs and benefits of regulations. In addition, those who support expanding the cost-benefit analysis requirements to the independent regulatory agencies have pointed to recent major legislation—particularly the Dodd-Frank Wall Street Reform and Consumer Protection Act,[151] which delegated a substantial amount of rulemaking authority to independent regulatory agencies—as an example of how transparency could be brought to the implementing regulations.[152]

Requirement for Choosing Least Costly Rule

Another element that some critics of the RAA have raised is the RAA's requirement that agencies choose the least costly regulatory alternative. It appears that this could come into conflict with current laws, such as the Clean Air Act[153] and the Occupational Safety and Health Act,[154] which enable agencies to issue regulations and make decisions based on factors other than economic costs or cost-benefit analysis. Other laws provide specific directives with regard to costs and benefits.[155] Given this potential conflict with existing law, some have identified the RAA as a "supermandate" that would supersede other requirements *not* to consider costs that exist in the enabling statutes of numerous agencies.[156]

Under the current executive orders that govern the rulemaking process, agencies are encouraged to select regulatory approaches that maximize net benefits, tailor their regulations to impose the "least burden on society" and ensure that the benefits of a rule justify the costs.[157] Under the RAA, it appears that the decision criteria for the selection of a regulatory alternative may change: agencies would be required to "adopt the least costly rule considered during the rule making … that meets relevant statutory objectives." However, this provision may create uncertainty as to what would constitute a "relevant statutory objective," and such uncertainty would likely be resolved over time through case law on particular statutes or through a specific congressional directive defining what the "relevant statutory objectives" for a particular law.

For example, in the Food and Drug Administration Food Safety Modernization Act, Congress directed the FDA to publish an NPRM "to establish science-based minimum standards for safe

---

[151] P.L. 111-203.

[152] For example, see the testimony of Christopher C. DeMuth, U.S. Congress, House Committee on the Judiciary, Hearing on H.R. 3010, the "Regulatory Accountability Act of 2011," 112th Cong., 1st sess., October 25, 2011.

[153] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 465, 471 (2001)("The text of § 109(b) ["the setting of ambient air quality standards 'the attainment and maintenance of which .. are requisite to protect the public health' with 'an adequate margin of safety'"], interpreted in its statutory and historical context and with appreciation for its importance to the [Clean Air Act] as a whole, unambiguously bars cost considerations from the [national ambient air quality standards]-setting process, and thus ends the matter [as to economic or cost considerations] for us as well as the EPA.").

[154] Am. Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490, 509 (1981)("In effect then, as the Court of Appeals held, Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6 (b)(5). Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.").

[155] *See id.* at 510 (discussing congressional directives on cost-benefit analysis in the Flood Control Act of 1936 and the Outer Continental Shelf Lands Act Amendments of 1978).

[156] For a more in-depth analysis of this question of whether the RAA would impose a "supermandate" on agencies, see ABA Comments, *supra* note 35, at i, 12-15.

[157] For example, Section 1(a) of E.O. 12866 says that agencies should "select those approaches that maximize net benefits."

production and harvesting of those types of fruits and vegetables … that are raw agricultural commodities for which the Secretary has determined that such standards minimize the risk of serious adverse health consequences or death."[158] The statutory provision contains specific requirements for the NPRM and the final rule, and provides requests for variances and exempts some farms. Specific statutory requirements such as those contained in this example could conceivably constitute "relevant statutory objectives" that would enable an agency to adopt a rule other than the least costly rule.

Additional Authority for OMB and OIRA

The proposed RAA would also change the role of OIRA in the rulemaking process. By enacting into law a requirement for agency consultation and adding other statutory functions for OIRA, the proposed legislation appears that it would increase the authority that OIRA has when it comes to influencing the rulemaking process. Supporters of the RAA would likely say that OIRA can serve as a check on agencies during the rulemaking process. Critics may argue that this could lead to the politicization of more rules and increased presidential control over those rules.

Increased Agency Use of Adjudication

If the RAA is enacted, and if an agency is not required by a particular statutory provision to use APA informal rulemaking procedures, the agency may increasingly turn to adjudication instead of informal rulemaking. Advantages to choosing adjudication over rulemaking procedures include an opportunity to avoid "[r]ulemaking's increasing procedural complexity," which could include the RAA's proposed amendments to the rulemaking process; the ability to change agency policy faster than through a subsequent rulemaking to modify or repeal a rule; "a desire to avoid political conflicts with congressional oversight committees and other overseers"; and the "situation-specific" nature of adjudication, which "potentially avoid[s] overinclusiveness or underinclusiveness."[159] The Supreme Court has stated that agencies may choose "between proceeding by general rule or by individual, *ad hoc* litigation" and that the choice between rulemaking and adjudication "is one that lies primarily in the informed discretion of the administrative agency."[160]

Potential for Increased and/or Lengthier Litigation

The RAA would provide that many of its requirements and agency determinations would be subject to judicial review, or clarify whether judicial review is available. For example, the RAA would provide for judicial review (or clarify that judicial review is available) for agency dispositions of issues with regard to IQA petitions, agency denials of information correction requests, agency denials of administrative appeals under IQA mechanisms, and agency failures to grant or deny IQA requests or appeals within 90 days. Such changes could allow interested parties with standing to litigate agency actions or raise additional claims in challenges to agency rulemakings. Under proposed 5 U.S.C. Section 553(k), the RAA would provide for judicial deference of an OIRA Administrator's determination regarding agency compliance with OIRA guidelines on the IQA that would apply in informal and formal rulemakings. The RAA would not provide for deference to certain agency interpretations or determinations; for example, a court could not defer to an agency's determinations of costs and benefits if the agency did not comply

[158] 21 U.S.C. §350h(a).

[159] LUBBERS, *supra* note 52 at 143-44.

[160] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

with OIRA guidelines on the assessment of costs and benefits under proposed 5 U.S.C. Section 553(k). The RAA's changes to judicial deference to agency interpretations and its amendments to APA judicial review provisions on actions made reviewable and scope of review may lead to lengthier court proceedings if courts cannot defer to agency interpretations or determinations.

Side-by-Side Comparison

Appendix A lists the provisions of the RAA and provides a side-by-side comparison of those provisions with provisions from relevant statutes, executive orders, and OMB documents. Generally, the provisions of the table are listed in the order that they are included in the House version of the RAA. Unless otherwise specified in the table or indicated by quotation marks, the text is pulled directly from the sources mentioned.

Some components of the RAA, such as those that define certain government entities (i.e., OIRA) and those that define certain statutes (i.e., the IQA) are excluded from the table. In addition, the statutes included in the table are those that have broadly applicable, cross-cutting rulemaking requirements.[161] Rulemaking statutes that apply to specific agencies are excluded. Similarly, when the table indicates that no broad requirement exists, there may be specific requirements for particular agencies in other statutes.[162]

[161] For example, the RFA contains a number of requirements for agencies during the rulemaking process, including requirements for impact analyses at the proposed rule stage and the final rule stage. These RFA requirements only apply when an agency determines that a rule will have a "significant economic impact on a substantial number of small entities." 5 U.S.C. §605(b).

[162] For example, as indicated earlier in this report, while there are not government-wide requirements for the issuance of an ANPRM, the Consumer Product Safety Commission is subject to such an ANPRM publication requirement. 15 U.S.C. §2058(a).

Appendix A. Comparison of Current Rulemaking Requirements and the Proposed Regulatory Accountability Act of 2011

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
Definition of a "Major" Rule	"(15) 'major rule' means any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) determines is likely to impose— "(A) an annual cost on the economy of $100,000,000 or more, adjusted annually for inflation; "(B) a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions; "(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign-based enterprises in domestic and export markets; or "(D) significant costs on multiple sectors of the economy.	**Administrative Procedure Act (APA)**: No definition. **Congressional Review Act (CRA)** §804(2): Any rule that the [OIRA Administrator] of the Office of Management and Budget "finds has resulted in or is likely to result in— (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act."	No definition of a "major" rule. **Executive Order (E.O.) 12866** §3(f) defines a "Significant regulatory action" as "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."
Definition of a "High-Impact" Rule	"(16) 'high-impact rule' means any rule that the Administrator of the OIRA determines is likely to impose an annual cost on the economy of $1,000,000,000 or more, adjusted annually for inflation.	No definition in APA.	No definition in relevant executive orders.
Definition of a "Guidance"	"(17) 'guidance' means an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue.	No definition in the APA, although guidance documents generally are considered to be a particular type of agency rule, known as a "general statement of policy."	No definition currently applicable. President Obama's E.O. 13497 revoked President Bush's E.O. 13422, which had made the further amendments to E.O. 12866, including the insertion of §3(g), which defined the phrase "guidance document." E.O. 13422, §3(g) defined "guidance document" as "an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory,

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			regulatory, or technical issue or an interpretation of a statutory or regulatory issue." **OMB's Final Bulletin on Agency Good Guidance Practices** defines the term "guidance document" to mean "an agency statement of general applicability and future effect, other than a regulatory action …, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue." The ellipses in the text stand for "as defined in Executive Order 12866, as further amended, section 3(g)." Presently, Executive Order 12866 does not contain a §3(g).
Definition of a "Major Guidance"	"(18) 'major guidance' means any guidance that the Administrator of [OIRA] finds is likely to lead to— "(A) an annual cost on the economy of $100,000,000 or more, adjusted annually for inflation; "(B) a major increase in costs or prices for consumers, individual industries, Federal, State, local or tribal government agencies, or geographic regions; "(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign-based enterprises in domestic and export markets; or "(D) significant impacts on multiple sectors of the economy.	No definition.	**OMB's Final Bulletin on Agency Good Guidance Practices** defines "significant guidance document" to mean a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to: (i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended. **OMB's Final Bulletin on Agency Good Guidance Practices** defines the term "economically significant guidance document" to mean a significant guidance document that may

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			reasonably be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy, except that economically significant guidance documents do not include guidance documents on Federal expenditures and receipts. (In Executive Order 13422, which has since been revoked by President Obama, President Bush defined "Significant guidance document" as follows: "'Significant guidance document'—(1) Means a guidance document disseminated to regulated entities or the general public that, for purposes of this order, may reasonably be anticipated to: (A) Lead to an annual effect of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or (D) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order")

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
Section 553 Rulemaking Considerations: Legal Authority and Other Statutory Considerations	"(b) Rule Making Considerations- In a rule making, an agency shall make all preliminary and final determinations based on evidence and consider, in addition to other applicable considerations, the following: "(1) The legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making. "(2) Other statutory considerations applicable to whether the agency can or should propose a rule or undertake other agency action.	No other requirements than those listed here for "considerations." (Note: see below for requirement of inclusion of references to legal authority in APA §553(b)(2).)	**E.O.12866** §1(b): The Principles of Regulation. … (9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions. (12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.
Section 553 Rulemaking Considerations: Nature of Problem to be Addressed	"(b) Rule Making Considerations … "(3) The specific nature and significance of the problem the agency may address with a rule (including the degree and nature of risks the problem poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction), whether the problem warrants new agency action, and the countervailing risks that may be posed by alternatives for new agency action.	No specific requirements for "considerations" during rulemaking process.	**E.O.12866** §1(b): The Principles of Regulation. … (1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem. (4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.
Section 553 Rulemaking Considerations: Existing Regulations	"(b) Rule Making Considerations … "(4) Whether existing rules have created or contributed to the problem the agency may address with a rule and whether those rules could be amended or rescinded to address the problem in whole or part.	No requirements in the APA for "considerations" of existing regulations, but under the **Regulatory Flexibility Act (RFA)** §603(b)(5): Initial regulatory flexibility analyses must contain "an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule."[a]	**E.O.12866** §1(b): The Principles of Regulation.: … (2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies. (Note: See below for requirements for retrospective review of existing regulations.)
Section 553 Rulemaking Considerations: Regulatory Alternatives	"(b) Rule Making Considerations … "(5) Any reasonable alternatives for a new rule or other response identified by the agency or interested persons, including not only responses that mandate particular conduct or manners of compliance, but also— "(A) the alternative of no Federal response; "(B) amending or rescinding existing rules; "(C) potential regional, State, local, or tribal regulatory action or other responses that could be taken in lieu of agency action; and "(D) potential responses that— "(i) specify performance objectives rather than conduct or manners of compliance; "(ii) establish economic incentives to encourage desired behavior; "(iii) provide information upon which choices can be made by the public; or "(iv) incorporate other innovative alternatives rather than agency actions that specify conduct or manners of compliance.	**RFA** §603: Initial regulatory flexibility analyses must contain "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact on small entities. Consistent with the stated objectives of the applicable statutes, the analysis shall discuss significant alternatives such as—(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof."[a] **RFA** §604: Final regulatory flexibility analyses must contain "legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected."[a] **Unfunded Mandates Reform Act (UMRA)** §205(a): IN GENERAL.—Except as provided in subsection (b), before promulgating any rule for which a written statement is required under section 202, the agency shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, for—	**E.O.12866** §1(b): The Principles of Regulation. … (3): Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. (8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt. **E.O. 13563** §(1)(b): Each agency must, among other things… (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
		(1) State, local, and tribal governments, in the case of a rule containing a Federal intergovernmental mandate; and (2) the private sector, in the case of a rule containing a Federal private sector mandate. (b) EXCEPTION.—The provisions of subsection (a) shall apply unless— (1) the head of the affected agency publishes with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted; or (2) the provisions are inconsistent with law. (c) OMB CERTIFICATION.—No later than 1 year after the date of the enactment of this Act, the Director of the Office of Management and Budget shall certify to Congress, with a written explanation, agency compliance with this section and include in that certification agencies and rulemakings that fail to adequately comply with this section.[b]	
Rulemaking Considerations: Costs and Benefits, Cost-Effectiveness, and Incentives (Note: see below for further information about requirements for cost-benefit analysis)	"(b) Rule Making Considerations … "(6) Notwithstanding any other provision of law- "(A) the potential costs and benefits associated with potential alternative rules and other responses considered under section 553(b)(5), including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs (including an estimate of the net gain or loss in domestic jobs), economic growth, innovation, and economic competitiveness; "(B) the means to increase the cost-effectiveness of any Federal response; and "(C) incentives for innovation, consistency, predictability, lower costs of enforcement and compliance (to government entities, regulated entities, and the public), and flexibility.	No requirement for "considerations" while looking at costs, but some statutes (**RFA**[a] and **UMRA**[b]) do require agencies to complete regulatory impact analyses for certain rules.	**E.O.12866** §9: Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law. See also E.O. 13563 §7(b). **E.O.12866** §1(b): The Principles of Regulation. … (5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity. (6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			determination that the benefits of the intended regulation justify its costs. (11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations. **E.O. 13563** §(1)(b): As stated in that Executive Order [12866] and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)… **E.O. 13563** §(1)(c) In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.
Advanced Notice of Proposed Rulemaking (ANPRM) for Major Rules, High-Impact Rules, and Rules Involving Novel Legal or Policy Issues	"(c) … In the case of a rule making for a major rule or high-impact rule or a rule that involves a novel legal or policy issue arising out of statutory mandates, not later than 90 days before a notice of proposed rule making is published in the Federal Register, an agency shall publish advance notice of proposed rule making in the Federal Register. In publishing such advance notice, the agency shall— "(1) include a written statement identifying, at a minimum— "(A) the nature and significance of the problem the agency may address with a rule, including data and other evidence and information on which the agency expects to rely for the proposed rule;	Not required by the APA; may be required by specific statutes.	No requirement in executive orders.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	"(B) the legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making; and "(C) preliminary information available to the agency concerning the other considerations specified in subsection (b); and "(D) in the case of a rule that involved a novel legal or policy issue arising out of statutory mandates, the nature of and potential reasons to adopt the novel legal or policy position upon which the agency may base a proposed rule; "(2) solicit written data, views or arguments from interested persons concerning the information and issues addressed in the advance notice; and "(3) provide for a period of not fewer than 60 days for interested persons to submit such written data, views, or arguments to the agency.		
Notice of Proposed Rulemaking: Publication Requirement	"(d) … (1) Before it determines to propose a rule, following completion of procedures under subsection (c), if applicable, and consultation with the Administrator of [OIRA], the agency shall publish either a notice of proposed rule making or a determination of other agency course …	**APA** §553(b): General notice of proposed rule making shall be published in the *Federal Register*, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law	No requirement in executive orders.
Notice of Proposed Rulemaking: OIRA Review/ Consultation	"(d) … (1) Before it determines to propose a rule, following completion of procedures under subsection (c), if applicable, and consultation with the Administrator of [OIRA], the agency shall publish either a notice of proposed rule making or a determination of other agency course …	No mention of OIRA.	**E.O.12866** §6(a)(3)(B): For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA: (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and (ii) An assessment of the potential costs and benefits of the regulatory action, … (C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of §3(f)(1), the

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law): (i) An assessment, including the underlying analysis, of benefits … (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action … (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives … [b]
Notice of Proposed Rulemaking: Notice Requirement	"(d)(1) A notice of proposed rule making shall include— "(A) a statement of the time, place, and nature of public rule making proceedings; "(B) reference to the legal authority under which the rule is proposed; "(C) the terms of the proposed rule; "(D) a description of information known to the agency on the subject and issues of the proposed rule, including— "(i) a summary of information known to the agency concerning the considerations specified in subsection (b); "(ii) a summary of additional information the agency provided to and obtained from interested persons under subsection (c); "(iii) a summary of any preliminary risk assessment or regulatory impact analysis performed by the agency; and "(iv) information specifically identifying all data, studies, models, and other evidence or information considered or used by the agency in connection with the determination by the agency to propose the rule; "(E)(i) a reasoned preliminary determination of need for the rule based on the information described under subparagraph (D); and	**APA** §553(b): … The notice shall include— (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. **RFA** §603(a): The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of a general notice of proposed rulemaking for the rule. [a]	No requirement in executive orders.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	"(ii) an additional statement of whether a rule is required by statute.		
Notice of Proposed Rulemaking: Costs and Benefits	"(d)(1)(F) a reasoned preliminary determination that the benefits of the proposed rule meet the relevant statutory objectives and justify the costs of the proposed rule, including all costs to be considered under subsection (b)(6), based on the information described under subparagraph (D) [description of the information known to the agency on the subject];	No requirement in the APA. The **RFA** does not specifically discuss costs and benefits, but §603(4) requires agencies to include in their initial regulatory flexibility analysis "a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;" §604(4) requires "a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;" and §604(5) requires "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." Furthermore, §607 requires those studies to be quantitative if possible: "In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable."[a] **UMRA** §202(a) requires agencies to include in their written statements accompanying rules: (2) a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector, as well as	**E.O. 12866** §6(a)(3)(B): For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of §3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law): (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.[b] **E.O. 12866** §6(a)(3)(C): For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of §3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law): (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation ... [b]

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
		the effect of the Federal mandate on health, safety, and the natural environment and such an assessment shall include— (A) an analysis of the extent to which such costs to State, local, and tribal governments may be paid with Federal financial assistance (or otherwise paid for by the Federal Government); and (B) the extent to which there are available Federal resources to carry out the intergovernmental mandate; (3) estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of— (A) the future compliance costs of the Federal mandate; and (B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector; (4) estimates by the agency of the effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material…[b]	

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
Notice of Proposed Rulemaking: Regulatory Alternatives (Note: see above for discussion of "consideration" of alternatives)	"(d)(1)(G) a discussion of— "(i) the alternatives to the proposed rule, and other alternative responses, considered by the agency under subsection (b); "(ii) the costs and benefits of those alternatives, including all costs to be considered under subsection (b)(6); "(iii) whether those alternatives meet relevant statutory objectives; and "(iv) why the agency did not propose any of those alternatives …	**RFA** §603: Initial regulatory flexibility analyses must contain "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact on small entities. Consistent with the stated objectives of the applicable statutes, the analysis shall discuss significant alternatives such as— (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof."[a] **UMRA** §205(a): IN GENERAL.—Except as provided in subsection (b), before promulgating any rule for which a written statement is required under section 202, the agency shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, for— (1) State, local, and tribal governments, in the case of a rule containing a Federal intergovernmental mandate; and (2) the private sector, in the case of a rule containing a Federal private sector mandate. (b) EXCEPTION.—The provisions of subsection (a) shall apply unless—	**E.O. 12866** §6(a)(3)(C): For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of §3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law): … (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.[b]

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
		(1) the head of the affected agency publishes with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted; or (2) the provisions are inconsistent with law. (c) OMB CERTIFICATION.—No later than 1 year after the date of the enactment of this Act, the Director of the Office of Management and Budget shall certify to Congress, with a written explanation, agency compliance with this section and include in that certification agencies and rulemakings that fail to adequately comply with this section.[b]	
Notice of Proposed Rulemaking: Existing Regulations	"(d)(1)(H)(i) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule; and "(ii) if so, whether or not the agency proposes to amend or rescind any such rules, and why.	No requirement at NPRM stage.	See above for statement on considerations of existing regulations.
Notice of Proposed Rulemaking: Disclosure Requirements in Connection with an Agency's Determination to Propose a Rule	All information provided to or considered by the agency, and steps to obtain information by the agency, in connection with its determination to propose the rule, including any preliminary risk assessment or regulatory impact analysis prepared by the agency and other information prepared or described by the agency under subparagraph (D) and, at the discretion of the President or the Administrator of [OIRA], information provided by that Office in consultations with the agency, shall be placed in the docket for the proposed rule and made accessible to the public by electronic means and otherwise for the public's use when the notice of proposed rule making is published.	No requirement in statute.	**E.O. 12866** §(6)(a)(3)(E) After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall: (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C); (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and (iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA. **E.O. 12866** §6(b)(4): Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements: (A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			the Federal Government regarding the substance of a regulatory action under OIRA review; (B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s); (ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and (iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section. (C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review: (i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested; (ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and (iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			the subject matter discussed during such communications. (D) After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.[b] **E.O. 13563** §(2)(b): To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.
Notice of Proposed Rulemaking: Determination of Other Agency Course	"(d) … Following completion of procedures under subsection (c), if applicable, and consultation with the Administrator of [OIRA], the agency shall publish either a notice of proposed rule making or a determination of other agency course … "(d)(2)(A) If the agency undertakes procedures under subsection (c) [ANPRM requirement for major rules, high-impact rules, and rules of novel legal or policy issues] and determines thereafter not to propose a rule, the agency shall, following consultation with [OIRA], publish a notice of determination of other agency course. A notice of determination of other agency course shall include information required by paragraph (1)(D) to be included in a notice of proposed rule making and a description of the alternative response the agency determined to adopt.	No requirement.	No requirement.
Notice of Proposed	"(d)(2)(B) If in its determination of other agency course the agency makes a determination to amend	No broadly applicable ANPRM requirement.	No requirement.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
Rulemaking: Amending or Repealing Rules	or rescind an existing rule, the agency need not undertake additional proceedings under subsection (c) [ANPRM requirement for major rules, high-impact rules, and rules of novel legal or policy issues] before the agency publishes a notice of proposed rule making to amend or rescind the existing rule.		
Notice of Proposed Rulemaking: Disclosure Requirements in Connection with an Agency's Determination of Other Agency Course	All information provided to or considered by the agency, and steps to obtain information by the agency, in connection with its determination of other agency course, including but not limited to any preliminary risk assessment or regulatory impact analysis prepared by the agency and all other information that would be required to be prepared or described by the agency under paragraph (1)(D) if the agency had determined to publish a notice of proposed rule making and, at the discretion of the President or the Administrator of [OIRA], information provided by that Office in consultations with the agency, shall be placed in the docket for the determination and made accessible to the public by electronic means and otherwise for the public's use when the notice of determination is published.	No requirement.	**E0 12866** §6(b)(4): Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements: (A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review; (B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s); (ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section. (C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review: (i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested; (ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and (iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications. (D) After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.[b]
Comment Period Requirement and Duration of Comment Period	"(3) After notice of proposed rule making required by this section, the agency shall provide interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation, except that … The agency shall provide not fewer than 60 days for interested persons to submit written data, views, or	**APA** §553(c): After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation … [No minimum time requirement in APA.]	**E.O.12866** §6(a): In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.[b] **E.O.13563** §2(b): … To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	argument (or 120 days in the case of a proposed major or high-impact rule).		comment period that should generally be at least 60 days.
Comments: Opportunity for Oral Presentation	"(d)(3)(A) if a hearing is required under paragraph (4)(B) or subsection (e), opportunity for oral presentation shall be provided pursuant to that requirement;	**APA** §553(c): After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation …	No requirement in relevant executive orders.
Formal Rulemaking	"(d)(3)(B) when other than under subsection (e) of this section rules are required by statute or at the discretion of the agency to be made on the record after opportunity for an agency hearing, sections 556 and 557 shall apply, and paragraph (4), requirements of subsection (e) to receive comment outside of the procedures of sections 556 and 557, and the petition procedures of subsection (e)(6) shall not apply.	**APA** §553(c): When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.	No requirement in relevant executive orders.
Petition for Information Quality Act Hearing	"(d)(4)(A) Within 30 days of publication of notice of proposed rulemaking, a member of the public may petition for a hearing in accordance with section 556 to determine whether any evidence or other information upon which the agency bases the proposed rule fails to comply with of the Information Quality Act. "(B)(i) The agency may, upon review of the petition, determine without further process to exclude from the rule making the evidence or other information that is the subject of the petition and, if appropriate, withdraw the proposed rule. The agency shall promptly publish any such determination. "(ii) If the agency does not resolve the petition under the procedures of clause (i), it shall grant any such petition that presents a prima facie case that evidence or other information upon which the agency bases the proposed rule fails to comply with the Information Quality Act, hold the requested hearing not later than 30 days after receipt of the petition, provide a reasonable opportunity for cross-examination at the hearing, and decide the issues presented by the petition not later than 60 days after receipt of the	No requirement in APA. **P.L. 106-554**, §515(b) [Information Quality Act] Content of Guidelines.—The guidelines under subsection (a) shall … (2) require that each Federal agency to which the guidelines apply— (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); …	No requirement in relevant executive orders. **OMB Memorandum Regarding Information Quality Guidelines: Principles and Model Language:** The information quality site should include … an easy-to-understand explanation of the agency's procedures regarding requests for correction (which shall include an explanation of how a person may file a request and, subsequently, an administrative appeal of the agency's response to the request). … Where existing public comment procedures – for rulemakings, adjudications, other agency actions or information products – provide well-established procedural safeguards that allow affected persons to contest information quality on a timely basis, agencies may use those procedures to respond to information quality complaints. However, agencies should respond sooner where needed to avoid the potential for actual harm or undue delay. … Unless there are important reasons for a different time period, agency procedures should provide for a written response by the agency to complaints and appeals within 60 calendar days. If the complain or appeal requires more time to resolve, the agency

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	petition. The agency may deny any petition that it determines does not present such a prima facie case. "(C) There shall be no judicial review of the agency's disposition of issues considered and decided or determined under subparagraph (B)(ii) until judicial review of the agency's final action. There shall be no judicial review of an agency's determination to withdraw a proposed rule under subparagraph (B)(i) on the basis of the petition. "(D) Failure to petition for a hearing under this paragraph shall not preclude judicial review of any claim based on the Information Quality Act under chapter 7 of this title.		should so notify the complainant within that period that more time is required, the reasons for the delay, and an estimated decision date.
Hearings for "High-Impact" Rules	"(e) Hearings for High-Impact Rules- Following notice of a proposed rule making, receipt of comments on the proposed rule, and any hearing held under subsection (d)(4), and before adoption of any high-impact rule, the agency shall hold a hearing in accordance with [5 U.S.C. §§556 and 557, APA hearing and initial decision requirements], unless such hearing is waived by all participants in the rulemaking other than the agency. The agency shall provide a reasonable opportunity for cross-examination at such hearing. The hearing shall be limited to the following issues of fact, except that participants at the hearing other than the agency may waive determination of any such issue: "(1) Whether the agency's asserted factual predicate for the rule is supported by the evidence. "(2) Whether there is an alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost (including all costs to be considered under subsection (b)(6)) than the proposed rule. "(3) If there is more than one alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost than the proposed rule, which alternative would achieve the relevant statutory objectives at the lowest cost.	No requirement in APA.	No requirement in relevant executive orders. (E.O. 12866 Defines "regulation" or "rule" as not including those rules issued under the formal rulemaking provisions of 5 U.S.C. §§556, 557.)

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	"(4) Whether, if the agency proposes to adopt a rule that is more costly than the least costly alternative that would achieve the relevant statutory objectives (including all costs to be considered under subsection (b)(6)), the additional benefits of the more costly rule exceed the additional costs of the more costly rule. "(5) Whether the evidence and other information upon which the agency bases the proposed rule meets the requirements of the Information Quality Act. "(6) Upon petition by an interested person who has participated in the rulemaking, other issues relevant to the rule making, unless the agency determines that consideration of the issues at the hearing would not advance consideration of the rule or would, in light of the nature of the need for agency action, unreasonably delay completion of the rule making. An agency shall grant or deny a petition under this paragraph within 30 days of its receipt of the petition. No later than 45 days before any hearing held under this subsection or sections 556 and 557, the agency shall publish in the Federal Register a notice specifying the proposed rule to be considered at such hearing, the issues to be considered at the hearing, and the time and place for such hearing, except that such notice may be issued not later than 15 days before a hearing held under subsection (d)(4)(B).		
Final Rules: OIRA Review/ Consultation	"(f)(1) The agency shall adopt a rule only following consultation with the Administrator of the OIRA to facilitate compliance with applicable rule making requirements.	No requirement for OIRA review in statute.	See section above on Notice of Proposed Rulemaking: OIRA Review/Consultation for details of required OIRA review at the proposed and final rules stage.
Final Rules: Scientific Basis	"(f)(2) The agency shall adopt a rule only on the basis of the best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule. (See also proposed §553(b) Rule Making Considerations- "In a rule making, an agency shall make all preliminary and final determinations based on evidence …").	No mention in the APA.	**E.O.12866** §1(b): Principles of Regulation. … (7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation. **E.O.13563** §1(a): Our regulatory system … must be based on the best available science.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			E.O.13563 §5: Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.
Final Rules: Requirement for Least Costly Rule	"(f)(3)(A) Except as provided in subparagraph (B), the agency shall adopt the least costly rule considered during the rule making (including all costs to be considered under subsection (b)(6)) that meets relevant statutory objectives. "(B) The agency may adopt a rule that is more costly than the least costly alternative that would achieve the relevant statutory objectives only if the additional benefits of the more costly rule justify its additional costs and only if the agency explains its reason for doing so based on interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule.	No mention in the APA. **UMRA** §205 (a): IN GENERAL.—Except as provided in subsection (b), before promulgating any rule for which a written statement is required under §202, the agency shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.[b]	No requirement to adopt "least costly" rule, although considerations of costs are required: **E.O. 12866** §1(b): Principles of Regulation… (11) Each agency shall tailor its regulations to impose the least burden on society… **E.O. 13563** §1(b): … As stated in that Executive Order [12866] and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity).
Final Rules: Publication Requirement	"(f)(4) When it adopts a final rule, the agency shall publish a notice of final rule making. The notice shall include— "(A) a concise, general statement of the rule's basis and purpose; "(B) the agency's reasoned final determination of need for a rule to address the problem the agency seeks to address with the rule, including a statement of whether a rule is required by statute and a summary of any final risk assessment or regulatory impact analysis prepared by the agency;	**APA** §553(c): … After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. … **RFA** §604(b): The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.[a] **UMRA** §202(b): PROMULGATION.—In promulgating a general notice of proposed rulemaking or a final rule for which a statement under subsection	No specific publication requirements for final rules in relevant executive orders, but see above for discussion of required considerations.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	"(C) the agency's reasoned final determination that the benefits of the rule meet the relevant statutory objectives and justify the rule's costs (including all costs to be considered under subsection (b)(6)); "(D) the agency's reasoned final determination not to adopt any of the alternatives to the proposed rule considered by the agency during the rule making, including— "(i) the agency's reasoned final determination that no alternative considered achieved the relevant statutory objectives with lower costs (including all costs to be considered under subsection (b)(6)) than the rule; or "(ii) the agency's reasoned determination that its adoption of a more costly rule complies with subsection (f)(3)(B); "(E) the agency's reasoned final determination— "(i) that existing rules have not created or contributed to the problem the agency seeks to address with the rule; or "(ii) that existing rules have created or contributed to the problem the agency seeks to address with the rule, and, if so— "(I) why amendment or rescission of such existing rules is not alone sufficient to respond to the problem; and "(II) whether and how the agency intends to amend or rescind the existing rule separate from adoption of the rule; "(F) the agency's reasoned final determination that the evidence and other information upon which the agency bases the rule complies with the Information Quality Act; …	(a) is required, the agency shall include in the promulgation a summary of the information contained in the statement.[b]	

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
Final Rules: Retrospective Review Requirements	"(f)(4)(G)(i) for any major rule or high-impact rule, the agency's [final rule must include a] plan for review of the rule no less than every ten years to determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives; "(ii) review of a rule under a plan required by clause (i) of this subparagraph shall take into account the factors and criteria set forth in subsections (b) through (f) of §553 of this title.	**RFA** §610: (a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years. (b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors— (1) the continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and	The executive orders do not require agencies to publish a plan for retrospective review along with each particular rule, although some executive orders have instituted a government-wide retrospective review of existing regulations (see E.O.12866: §5; E.O.13563 §6; E.O.13579 §2).

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
		(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.[a]	

Exceptions from Notice and Hearing Requirements	"(g)(1) Except when notice or hearing is required by statute, the following do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice: (A) Subsections (c) through (e). [(c) advance notice of proposed rulemaking for major and high-impact rules, (d) notice of proposed rulemaking/determinations of other agency course, (e) hearings for high-impact rules] (B) Paragraphs (1) through (3) of subsection (f). (C) Subparagraphs (B) through (H) of subsection (f)(4). [(f) requirements for final rules, except (f)(4)(A), a concise, general statement of the rule's basis and purpose] "(2)(A) When the agency for good cause, based upon evidence, finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that compliance with subsection (c), (d), or (e) or requirements to render final determinations under subsection (f) [final rules] of this section before the issuance of an interim rule is impracticable or contrary to the public interest, including interests of national security, such subsections or requirements to render final determinations shall not apply to the agency's adoption of an interim rule. "(B) If, following compliance with subparagraph (A) of this paragraph, the agency adopts an interim rule, it shall commence proceedings that comply fully with subsections (d) through (f) [(d) notice of proposed rulemaking/determinations of other agency course, (e) hearings for high-impact rules, (f) final rules] of this section immediately upon publication of the interim rule. No less than 270 days from publication of the interim rule (or 18 months in the case of a major rule or high-impact rule), the agency shall complete rule making under subsections (d) through (f) of this subsection and take final action to adopt a final rule or rescind the interim rule. If the agency fails to take timely final action, the interim rule will cease to have the effect of law. "(C) Other than in cases involving interests of national security, upon the agency's publication of an interim rule without compliance with subsections (c), (d), or (e) or requirements to render final	**APA** §553(b): … unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. … Except when notice or hearing is required by statute, this subsection does not apply— (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. Chapter 7 of Title 5, *United States Code*, provides for judicial review of final agency actions, including interim rules.	None provided in relevant executive orders.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	determinations under subsection (f) of this section, an interested party may seek immediate judicial review under chapter 7 of this title of the agency's determination to adopt such interim rule. The record on such review shall include all documents and information considered by the agency and any additional information presented by a party that the court determines necessary to consider to assure justice. "(3) When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are unnecessary, including because agency rule making is undertaken only to correct a de minimis technical or clerical error in a previously issued rule or for other noncontroversial purposes, the agency may publish a rule without compliance with subsections (c), (d), (e), or (f)(1)-(3) and (f)(4)(B)-(F). If the agency receives significant adverse comment within 60 days after publication of the rule, it shall treat the notice of the rule as a notice of proposed rule making and complete rule making in compliance with subsection (d) and (f).		
Additional Requirements for Hearings	"(h) Additional Requirements for Hearings- When a hearing is required under subsection (e) or is otherwise required by statute or at the agency's discretion before adoption of a rule, the agency shall comply with the requirements of sections 556 and 557 in addition to the requirements of subsection (f) in adopting the rule and in providing notice of the rule's adoption.	No additional requirements.	No requirements in executive orders.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
Date of Publication of Rule	"(i) Date of Publication of Rule- The required publication or service of a substantive final or interim rule shall be made not less than 30 days before the effective date of the rule, except— "(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; "(2) interpretive rules and statements of policy; or "(3) as otherwise provided by the agency for good cause found and published with the rule.	**APA** §553(d): The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except— (1) a substantive rule which grants or recognized an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule. **CRA** §801(3): A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of— (A) the later of the date occurring 60 days after the date on which— (i) the Congress received the report submitted under paragraph (1); or (ii) the rule is published in the Federal Register, if so published; (B) if the Congress passes a joint resolution of disapproval described in §802 relating to the rule, and the President signs a veto of such resolution, the earlier date - (i) on which either House of Congress votes and fails to override the veto of the President; or (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or (C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under §802 is enacted).	
Right to Petition	"(j) Right To Petition- Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.	**APA** §553(e): Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.	No requirement in executive orders.

Rulemaking Guidelines	"(k) Rule Making Guidelines- (1)(A) The Administrator of [OIRA] shall establish guidelines for the assessment, including quantitative and qualitative assessment, of the costs and benefits of proposed and final rules and other economic issues or issues related to risk that are relevant to rule making under this title. The rigor of cost-benefit analysis required by such guidelines shall be commensurate, in the Administrator's determination, with the economic impact of the rule. "(B) To ensure that agencies use the best available techniques to quantify and evaluate anticipated present and future benefits, costs, other economic issues, and risks as accurately as possible, the Administrator of [OIRA] shall regularly update guidelines established under paragraph (1)(A) of this subsection. "(2) The Administrator of [OIRA] shall also issue guidelines to promote coordination, simplification and harmonization of agency rules during the rule making process and otherwise. Such guidelines shall assure that each agency avoids regulations that are inconsistent or incompatible with, or duplicative of, its other regulations and those of other Federal agencies and drafts its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty. "(3) To ensure consistency in Federal rule making, the Administrator of [OIRA] shall— "(A) issue guidelines and otherwise take action to ensure that rule makings conducted in whole or in part under procedures specified in provisions of law other than those of subchapter II of this title conform to the fullest extent allowed by law with the procedures set forth in §553 of this title; and "(B) issue guidelines for the conduct of hearings under subsections 553(d)(4) and 553(e) of this section, including to assure a reasonable opportunity for cross-examination. Each agency shall adopt regulations for the conduct of hearings consistent with the guidelines issued under this subparagraph.	No current requirement for OMB guidelines in statute.	**E.O. 12866** §6(b): OIRA Responsibilities. The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. [b] **OMB Circular A-4** contains guidance for agencies on best practices for cost-benefit analyses.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
Information Quality Act in Rulemaking	"(k)(4) [The Administrator of OIRA shall] issue guidelines pursuant to the Information Quality Act to apply in rule making proceedings under [5 U.S.C. §§553, 556 and 557]. In all cases, such guidelines, and the Administrator's specific determinations regarding agency compliance with such guidelines, shall be entitled to judicial deference.	No mention in APA, but OMB has issued documents to comply with the Information Quality Act (IQA) providing guidance on agencies' compliance with the IQA.	**OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication:** "[A]gency reliance on [the] studies as published in the agency's notice of proposed rulemaking would constitute dissemination of [the] studies. These guidelines would require the rulemaking agency, prior to publishing the notice of proposed rulemaking, to evaluate [the] studies to determine if the analytic results stated therein would meet the 'capable of being substantially reproduced' standards in paragraph V.3.b.ii.B. and, if necessary, related standards governing original and supporting data in paragraph V.3.b.ii.A. If the agency were to decide that any of the five studies would not meet the reproducibility standard, the agency may still rely on them but only if they satisfy the transparency standard and as applicable-the disclosure of robustness checks required by these guidelines. Otherwise, the agency should not disseminate any of the studies that did not meet the applicable standards in the guidelines at the time it publishes the notice of proposed rulemaking."[c]
Disclosure Requirements in Connection with Promulgation of a Rule	"(l) Inclusion in the Record of Certain Documents and Information- The agency shall include in the record for a rule making, and shall make available by electronic means and otherwise, all documents and information considered by the agency during the proceeding, including, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, documents and information communicated by that Office during consultation with the Agency.	No requirement.	**E.O. 12866** §6(b)(4): Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements: (A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review; (B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines:

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			(i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s); (ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and (iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section. (C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review: (i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested; (ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and (iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			(D) After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.[b] **E.O. 13563** §2(b): To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.
Monetary Policy Exemption	"(m) Monetary Policy Exemption- Nothing in subsection (b)(6), subparagraphs (F) and (G) of subsection (d)(1), subsection (e), subsection (f)(3), and subparagraphs (C) and (D) of subsection (f)(5) [containing requirements for agencies to consider costs and choose least costly alternative] shall apply to rule makings that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee."	No mention.	No mention in executive orders.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
Procedures to Issue Major Guidance	"(a) Before issuing any major guidance, or guidance that involved a novel legal or policy issue arising out of statutory mandates, an agency shall— "(1) make and document a reasoned determination that— "(A) assures that such guidance is understandable and complies with relevant statutory objectives and regulatory provisions (including any statutory deadline for agency action); "(B) summarizes the evidence and data on which the agency will base the guidance; "(C) identifies the costs and benefits (including all costs to be considered during the rule making under §553(b) of this title) of conduct conforming to such guidance and assures that such benefits justify such costs; and "(D) describes alternatives to such guidance and their costs and benefits (including all costs to be considered during rule making under §553(b) of this title) and explains why the agency rejected those alternatives; and "(2) confer with the OIRA Administrator on the issuance of such guidance to assure that the guidance is reasonable, understandable, consistent with relevant statutory and regulatory provisions and requirements or practices of other agencies, does not produce costs that are unjustified by the guidance's benefits, and is otherwise appropriate. Upon issuing major guidance, the agency shall publish the documentation required by subparagraph (1) by electronic means and otherwise.	**APA:** Guidance documents are not required to undergo APA notice and comment procedures, which do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."	No requirements in executive orders. **OMB Final Bulletin on Agency Good Guidance Practices** provides "Basic Agency Standards for Significant Guidance Documents": 1. Approval Procedures: a. Each agency shall develop or have written procedures for the approval of significant guidance documents. Those procedures shall ensure that the issuance of significant guidance documents is approved by appropriate senior agency officials. b. Agency employees should not depart from significant guidance documents without appropriate justification and supervisory concurrence. 2. Standard Elements: Each significant guidance document shall: a. Include the term "guidance" or its functional equivalent; b. Identify the agenc(ies) or office(s) issuing the document; c. Identify the activity to which and the persons to whom the significant guidance document applies; d. Include the date of issuance; e. Note if it is a revision to a previously issued guidance document and, if so, identify the document that it replaces; f. Provide the title of the document, and any document identification number, if one exists; g. Include the citation to the statutory provision or regulation (in Code of Federal Regulations format) which it applies to or interprets; and h. Not include mandatory language such as "shall," "must," "required" or "requirement," unless the agency is using these words to describe a statutory or regulatory requirement, or the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties. **OMB Final Bulletin on Agency Good Guidance Practices** provides "Notice and Public

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
			Comment for Economically Significant Guidance Documents": 1. In General: Except as provided in Section IV(2), when an agency prepares a draft of an economically significant guidance document, the agency shall: a. Publish a notice in the Federal Register announcing that the draft document is available; b. Post the draft document on the Internet and make it publicly available in hard copy (or notify the public how they can review the guidance document if it is not in a format that permits such electronic posting with reasonable efforts); c. Invite public comment on the draft document; and d. Prepare and post on the agency's website a response-to-comments document. 2. Exemptions: An agency head, in consultation with the OIRA Administrator, may identify a particular economically significant guidance document or category of such documents for which the procedures of this Section are not feasible or appropriate.
Binding Nature of Agency Guidance	"(b) Agency guidance— "(1) is not legally binding and may not be relied upon by an agency as legal grounds for agency action; "(2) shall state in a plain, prominent and permanent manner that it is not legally binding; and "(3) shall, at the time it is issued or upon request, be made available by the issuing agency to interested persons and the public by electronic means and otherwise. Agencies shall avoid the issuance of guidance that is inconsistent or incompatible with, or duplicative of, the agency's governing statutes or regulations, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.	No requirement.	No mention.
Presidential Authority to Issue Guidelines for	"(c) The [OIRA Administrator] shall have authority to issue guidelines for use by the agencies in the issuance of major guidance and other guidance. Such guidelines		No specific authority granted in executive orders, but E.O. 12866 created OIRA as "the repository of expertise concerning regulatory issues, including

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
Issuance of Guidance	shall assure that each agency avoids issuing guidance documents that are inconsistent or incompatible with, or duplicative of, the law, its other regulations, and or the regulations of other Federal agencies and drafts its guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.		methodologies and procedures that affect more than one agency, this Executive Order, and the President's regulatory policies." The **OMB Final Bulletin on Agency Good Guidance Practices** was issued under statutory authority, now-revoked Executive Order 13422, and OMB's general authorities to oversee and coordinate the rulemaking process. In the IQA, Congress directed OMB to issue guidelines to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, utility, objectivity and integrity of information disseminated by Federal agencies." References now-revoked Executive Order 13422's discussion of OMB's authority to oversee agency guidance. OMB has additional authorities to oversee the agencies in the administration of their programs, according to the Final Bulletin on Agency Good Guidance.
5 U.S.C. §556 Hearings, Presiding Employees, Powers and Duties, Burden of Proof, Evidence, Record as Basis of Decision	Replaces 5 U.S.C. §556(e) with: "(e)(1) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with [5 U.S.C. §557] and shall be made available to the parties and the public by electronic means and, upon payment of lawfully prescribed costs, otherwise. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. "(2) Notwithstanding paragraph (1) of this subsection, in a proceeding held under this section pursuant to [proposed 5 U.S.C. §§553(d)(4), petition for a hearing regarding the proposed rule's compliance with the IQA] or 553(e) [hearings for high-impact rules], the record for decision shall include any information that	**APA** §556(e): The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with [5 U.S.C. §557] and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.	N/A (E.O. 12866 Defines "regulation" or "rule" as not including those rules issued under the formal rulemaking provisions of 5 U.S.C. §§556, 557.)

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	is part of the record of proceedings under 5 U.S.C. §553. "(f) When an agency conducts rule making under 5 U.S.C. §§556 and 557 directly after concluding proceedings upon an ANPRM under [proposed 5 U.S.C. §553(c) for major and high-impact rules], the matters to be considered and determinations to be made shall include, among other relevant matters and determinations, the matters and determinations described in [proposed 5 U.S.C. §553(b) rulemaking considerations] and (f) [determinations for adoption of final rules].		
5 U.S.C. §556, Grants or Denials of Petitions for Hearings, and Rules on Monetary Policy	"(g) Upon receipt of a petition for a hearing under [5 U.S.C §556], the agency shall grant the petition in the case of any major rule, unless the agency reasonably determines that a hearing would not advance consideration of the rule or would, in light of the need for agency action, unreasonably delay completion of the rule making. The agency shall publish its decision to grant or deny the petition when it renders the decision, including an explanation of the grounds for decision. The information contained in the petition shall in all cases be included in the administrative record. This subsection [proposed 5 U.S.C. §556(g)] shall not apply to rule makings that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.	No mention.	No mention. (E.O. 12866 Defines "regulation" or "rule" as not including those rules issued under the formal rulemaking provisions of 5 U.S.C. §§556, 557.)
Actions Reviewable	**H.R. 3010** keeps current 5 U.S.C. §704 as a new subsection (a), but adds the following statement to the end: 'Denial by an agency of a correction request or, where administrative appeal is provided for, denial of an appeal, under an administrative mechanism described in subsection (b)(2)(B) of the Information Quality Act, or the failure of an agency within 90 days to grant or deny such request or appeal, shall be final action for purposes of this section.	**APA** §704: Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and	**E.O. 12866** §10: Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	Amends 5 U.S.C. §704 by adding a subsection (b) for immediate, limited judicial review of certain agency actions: "(b) Other than in cases involving interests of national security, notwithstanding subsection (a) of this section, upon the agency's publication of an interim rule without compliance with [proposed 5 U.S.C. §553 (c), (d), or (e) - ANPRMs for major and high-impact rules, NPRMs and determinations of other agency course, hearings for high-impact rules] or requirements to render final determinations under [proposed 5 U.S.C. §553(f) - determinations for adoption of final rules], an interested party may seek immediate judicial review under this chapter of the agency's determination to adopt such rule on an interim basis. Review shall be limited to whether the agency abused its discretion to adopt the interim rule without compliance with [proposed 5 U.S.C. §553 (c), (d), or (e)] or without rendering final determinations under [proposed 5 U.S.C. §553(f)]. **S. 1606** keeps current 5 U.S.C. §704 as a new subsection (a). Amends 5 U.S.C. §704 by adding "(b)(1) Except as provided under paragraph (2) and notwithstanding subsection (a), upon the agency's publication of an interim rule without compliance with section 553 (c), (d), or (e) or requirements to render final determinations under subsection (f) of section 553, an interested party may seek immediate judicial review under this chapter of the agency's determination to adopt such rule on an interim basis. Review shall be limited to whether the agency abused its discretion to adopt the interim rule without compliance with section 553 (c), (d), or (e) or without rendering final determinations under subsection (f) of section 553. "(2) This subsection shall not apply in cases involving interests of national security.	provides that the action meanwhile is inoperative, for an appeal to superior agency authority. **IQA** (b)(2)(B): The guidelines under subsection (a) shall—… (2) require that each Federal agency to which the guidelines apply—… (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a) ….	

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	"(c) For rules other than major rules and high-impact rules, compliance with sections 553(b)(6), (d)(1) (F) through (G), and (f)(3) and (4) (C) through (D) shall not be subject to judicial review. In all cases, the determination that a rule is not a major rule within the meaning of section 551(19)(A) or a high-impact rule shall be subject to judicial review under section 706(a)(2)(A). "(d) Nothing in this section shall be construed to limit judicial review of an agency's consideration of costs or benefits as a mandatory or discretionary factor under the statute authorizing the rule or any other applicable statute.		
Scope of Review and Deference to Agency Interpretations of Agency Rules and Determinations **5 U.S.C. §706**	Amends 5 U.S.C. §706 to read as follows: (a) To the extent necessary … [same as existing 5 U.S.C. §706]. The reviewing court shall— (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (including the IQA); … [same as 5 U.S.C. §706]. Amends 5 U.S.C. §706 by adding at the end the following: "(b) The court shall not defer to the agency's— "(1) interpretation of an agency rule if the agency did not comply with the procedures of 5 U.S.C. §553 or §§556-557 to issue the interpretation; "(2) determination of the costs and benefits or other economic or risk assessment of the action, if the agency failed to conform to guidelines on such determinations and assessments established by the OIRA Administrator under §553(k); or "(3) determinations made in the adoption of an interim rule; or	**APA** §706: To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.	No mention.

Issue	RAA (H.R. 3010 as passed by the House on Dec. 3, 2011)	Relevant Statutes: APA, RFA, UMRA, CRA, and IQA	Executive Orders on Review of Rulemaking (12866, 13563, 13579) and OMB Documents
	"(4) guidance. "(c) The court shall review agency denials of petitions under §553(e)(6) or any other petition for a hearing under §§556 and 557 for abuse of agency discretion.	In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. [Deference to agency interpretations of the agency's own rule is addressed in case law. *See, e.g.,* Auer v. Robbins, 519 U.S. 452 (1997); Talk America, Inc. v. Michigan Bell Telephone Co., 564 U.S. __ (2011), 131 S. Ct. 2254 (2011)("[w]e defer to an agency's interpretation in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[s]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question")(quoting *Auer*, 519 U.S. at 461-62); Pliva, Inc. v. Mensing, 564 U.S. __ (2011), 131 S. Ct. 2567 (2011)(deferring to FDA's interpretation of its regulations on drug labeling).	
Definition of Substantial Evidence	Amends 5 U.S.C. §701(b) by adding a definition of substantial evidence that applies for purposes of Chapter 7 (Judicial Review) of Title 5, United States Code: "(3) 'substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever in the record fairly detracts from the weight of the evidence relied upon by the agency to support its decision.	No definition.[d]	N/A
Applicability to Pending or Completed Rulemakings	The amendments made by this Act to— (1) 5 U.S.C. §§553, 556, and 704; (2) 5 U.S.C. §701(b); (3) 5 U.S.C. §706(b)(2) and (3); and (4) 5 U.S.C. §706(c); shall not apply to any rule makings pending or completed on the date of enactment of this Act.	Applicable	Applicable

a. The Regulatory Flexibility Act contains a number of requirements for agencies during the rulemaking process, including requirements for impact analyses at the proposed rule stage and the final rule stage. However, these requirements only apply when an agency determines that a rule will have a "significant economic impact on a substantial number of small entities."

b. The RAA uses the APA's definition of an agency, meaning that the RAA would impose additional requirements on independent regulatory agencies, which have been exempted from certain statutory and executive order mandates. For example, the parts of Executive Order 12866 that concern centralized review of regulations by OIRA do not apply to statutorily designated "independent regulatory agencies," as listed in 44 U.S.C. §3502. However, other parts of E.O. 12866 do apply to independent regulatory agencies—such as the requirements that each agency (1) "prepare an agenda of all regulations under development or review" and (2) "prepare a Regulatory Plan ... of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter." 58 Fed. Reg. at 51738 (§4(b) and (c)). The RAA would allow OIRA review of rulemaking by independent regulatory agencies. Certain statutes applicable to the rulemaking process also exempt independent regulatory agencies from particular requirements. For example, the Unfunded Mandates Reform Act defines agency to exclude independent regulatory agencies. 2 U.S.C. §658(1).

c. 67 Fed. Reg. 8452, 8457 (Feb. 22, 2002).

d. See Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 531-32 (4th ed. 2006) (discussing the convergence of the substantial evidence and arbitrary and capricious tests in judicial review of informal rulemaking).

Appendix B. List of Abbreviations Used in This Report

APA	Administrative Procedure Act
CRA	Congressional Review Act
ANPRM	Advance Notice of Proposed Rulemaking
EO	Executive Order
GAO	Government Accountability Office
IQA	Information Quality Act
NPRM	Notice of Proposed Rulemaking
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
PRA	Paperwork Reduction Act
RAA	Regulatory Accountability Act of 2011
RFA	Regulatory Flexibility Act
UMRA	Unfunded Mandates Reform Act

Author Information

Maeve P. Carey
Analyst in Government Organization and Management

Acknowledgments

This report was originally co-authored with Vanessa K. Burrows, a former Legislative Attorney at CRS. Questions from congressional clients, about Sections 5-9 of the Regulatory Accountability Act can be directed to Daniel T. Shedd in the American Law Division.

Disclaimer